

# **Australasian law and Canadian statutes in the Nineteenth Century: a study of the movement of colonial legislation between jurisdictions**

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## **Author's Note**

This paper was presented at the Australia and New Zealand Law and History Society Conference, Canberra, 2000

A revised version was later published as Jeremy Finn "Australasian Law and Canadian Statutes in the Nineteenth Century: a Study of the Movement of Colonial Legislation Between Jurisdictions" (2002) 25:2 Dalhousie Law Journal 169-214.:

## **1. Introduction**

This paper considers two principal areas. The first is an investigation of the extent to which the various Canadian<sup>1</sup> legislatures in the period 1850 - 1900 drew upon legislation previously enacted in New Zealand or in one of the Australian colonies. The existence of such borrowing has been known for some time but has so far received only slight scholarly attention – as for example Perry's investigation of the Victorian derivation of the NorthWest Irrigation Act<sup>2</sup> and John McLaren's study of immigration laws<sup>3</sup>, and primarily as a phenomenon affecting only western Canada.

The second part of the enquiry attempts to how legislative precedents from the Australasian colonies came to be used by the Canadian jurisdictions. It attempts to assess the data on borrowing from Australasian law in the context of the contemporary attitudes to legislation derived from other colonies, and in particular to consider how this interacted with the primary sources of Canadian colonial law – local innovation and adaptation or adoption of British law. It is suggested that rather

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<sup>1</sup> The scope of the study comprehends the Canadian jurisdictions which had their own legislatures and in which English-based law dominated in the nineteenth century. Thus it considers Dominion law, as well as laws passed in the United Provinces of Canada, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario and Prince Edward island, but not Quebec, Lower Canada, Alberta, Newfoundland or Saskatchewan. "Canadian" is used as the only suitable comprehensive term for the jurisdictions studied.

<sup>2</sup> David R Perry "Water Law of the Canadian West" in John McLaren, Hamar Foster and Chet Orloff *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West* (Canadian Plains Research Centre, Regina, 1992) especially at p282. More detailed accounts are to be found in the "General report on Irrigation in the North west territories" (Annual Report of the Department of the Interior, 1894) and C S Churchill "the Origins of Canadian Irrigation law" *Can Hist Review* 29 (1948) 359-360.

<sup>3</sup> J P S McLaren "The Early British Columbia Supreme Court and the 'Chinese Question' : Echoes of the rule of law" (1991) 20 *Man LJ* 107, at 109 (suggesting an Australian source). See also John McLaren, Hamar Foster and Chet Orloff "Law for the Elephant, Law for the Beaver: Tracking the Beasts" in McLaren, Foster and Orloff *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West* (Canadian Plains Research Centre, Regina, 1992) p15 and John McLaren "The Burden of Empire and the Legalisation of White Supremacy in Canada 1860-1910" in W M Gordon & T D Fergus (eds) "Making Legal History: Proceedings of the Ninth British Legal History Conference 1989". McLaren's work may be supplemented by consideration of the deliberately derivative nature of the federal Chinese Immigration Act 1885. See speech by Chapleau [1885] *Canadian House of Commons Debates* 3004; and also see [1885] *Debates of the Senate of Canada* 1299.

than being restricted to a “bipolar” theory of the origins of Canadian law, it is necessary to consider the extent to which colonial legal and parliamentary figures were willing to experiment with laws and legal institutions not derived from either local experience or British precedent.

A final introductory point concerns the proof that intercolonial borrowings took place. In many cases this is manifest from the parliamentary debates, where recorded, or from other official documents such as the reports of Attorneys-general to the Colonial Office or departmental memoranda. In a limited number of cases the evidence comes from private documents or published sources.

Canadian archival or governmental sources are not perhaps as useful as those in some other jurisdictions because of the absence of any official charged primarily with preparing legislation. Although in most jurisdictions this task fell to the Attorney-General, many others were involved, and thus it becomes rather more difficult to ensure the appropriate materials are sought.

It is clear that many statutes were first drawn up outside official circles. The most notable examples to be found are various Torrens title bills, some of which were prepared by lawyers acting on behalf of reform groups, others by provincial law societies<sup>4</sup>. Many other examples of such non-official drafting can be found in all the Canadian jurisdictions.

It is clear, too, that many judges were active in the field. The best known example of this is the substantial contribution to British Columbia statute law made by Matthew Baillie Begbie. Begbie has been praised as an innovative draftsman, although it is doubtful that such a reputation is justified. Indeed, much of Begbie’s work appears to have involved adaptation of statutes from other colonies, rather than the originality so far attributed to them. Begbie’s biographer, D R Williams, writing in the Dictionary of Canadian Biography, states :

“The three most important statutes produced in the Colony [British Columbia] prior to its union with Vancouver’s Island were his handiwork : the Aliens Act 1859, the Gold Fields Act 1859 and the Pre-emption Act 1860”<sup>5</sup>

As is discussed below the second of these was prepared following the lines of New Zealand law forwarded to British Columbia by the Colonial Office. The first of Williams’s selection appears also to have been derived from the legislation of another colony, in this case Canada, again forwarded by the Colonial Office<sup>6</sup>.

### **c. Conduits for information**

How did information about possible precedents from other colonies travel between colonies? In Canada it appears official or governmental channels were by far the most significant, though others did exist.

Information often came through connections between colonial or provincial governments, or between the local government and the Colonial Office in Britain, were often very important. Governmental agencies such as Commissions of Enquiry were of great importance in some areas in the latter part of the century.

### **Official channels**

#### **(i) the Colonial office**

it is clear that in some cases the Colonial office provided a very important conduit for information. Information passed by the Colonial Office was important in the framing of

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<sup>4</sup> Discussed below at pp27 and 29, and p27, respectively.

<sup>5</sup> DCB vol 12 p77, 78

<sup>6</sup> See Douglas to Bulwer Lytton 12 May 1859 CO60/4, despatch no 153/59.

early British Columbian statutes (??see below) , but a very intriguing example of the indirect influence of the Colonial Office in triggering derivative legislation is provided by the one clear example of borrowing from Australasia to be found in the law of the small and somewhat isolated province of Prince Edward Island where the Escheats Act 1870(PEI) was modeled on the New Zealand Escheats Act 1868. The parliamentary record establishes the derivation beyond question, as the Premier is reported as saying when introducing the Bill in the Legislative Council :

“I do not know that I would have considered myself under any necessity of introducing such a bill, but it was suggested to me a few days ago by the Attorney-General [Dennis O'Meara Reddin] and an Act of New Zealand providing for such cases was pointed out, of which this bill is almost a verbatim copy”<sup>7</sup>.

However little else about the bill can be determined. It was apparently not considered controversial, as it passed both the Legislative Council and the House of Assembly, and received the royal assent, within a mere nine days<sup>8</sup>. Nor, apparently, did it provoke any significant interest among the local newspaper editors<sup>9</sup>. It may be thought unusual, if not indeed downright odd, that a relatively conservative colony such as Prince Edward Island would be look to the young colony of New Zealand for guidance on such a technical area such as the law of escheats (that is, the law governing the occasions whereby - a deceased's estate could revert to the Crown because there were no heirs at law). It seems probable that local interest in the subject had been kindled by a Colonial Office circular of 26 July 1867, which had not only suggested attention be given to the subject, but had included a copy of a Barbados Act of 1858,<sup>10</sup> and perhaps sustained by a second Colonial Office circular in 1869 which suggested that difficulties had been encountered from too hasty an adoption of the Barbados Act<sup>11</sup> and enclosed a “sketch” of a more suitable statute. However, and regrettably, it is impossible to determine why Reddin selected the New Zealand Act of 1868 as an alternative precedent, and , perhaps more interestingly, how he came to know of its existence.

## **(ii) Royal Commissions and other official inquiries**

One of the most important modes of establishing and publicising the laws of other jurisdictions as potential models for local legislation is the use of Royal Commissions or Commissions of Enquiry into particular social or economic issues. The most notable examples of this are to be found in Ontario and in the Dominion of Canada in the latter decades of the nineteenth century. The most cogent evidence of legislation

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<sup>7</sup> (1870) *Debates and Proceedings of the Legislative Council of Prince Edward Island* 105 (13 April 1870). See also report of F Brecken, Attorney-General (vice Reddin) 17 October 1870, enclosed with Robinson to Kimberley 1 November 1870 CO226/106 despatch no 9/70. The only other example traced of a legislator in Prince Edward Island looking beyond the traditional exemplars of England and other Canadian jurisdictions came in 1862 where in the course of one of the perennial debates on the abolition of the Legislative Council it appears “a Mr Hensley” is said to have referred to the Legislative Council franchise in the Cape of Good Hope, or at least to an account of that franchise given in *Martin's British Colonies*, see (1870) *Journal of the Legislative Council of Prince Edward Island* 14 April 1870, and 23 April 1870.

<sup>8</sup> The *PEI Legislative Assembly Journal* shows that the Escheats Bill was brought down from the Legislative Council on 14 April 1870 and received its first and second readings and passed the committee. The third reading was on 16 April and royal assent was given on 19 April 1870.

<sup>9</sup> Apparently no copies of the relevant daily newspapers survive, but a local weekly “*The Islander*” on 22 April noted the passage of the bill without reporting the debates or commenting on the substance of the bill.

<sup>10</sup> CO854/8.

<sup>11</sup> See Circular Despatch 28 December 1869 CO854/10.

on an Australasian model resulting from such a Commission's report is to be found in the area of mining law, discussed below. Other Commissions of Enquiry also sought information from the Australasian colonies, and thereby gave publicity to Australasian practices. Naturally such commissions most commonly focussed on practices in various parts of Canada, the United States and Britain, but Australian practices were also often canvassed. Thus an Ontario Commission of Enquiry into the provincial penal system visited New York, Massachusetts, Michigan and Ohio in addition to compiling reports from other American institutions, Britain and what is referred to as "Australia"<sup>12</sup>, but is in fact restricted to the colony of Victoria<sup>13</sup>. A detailed account of the indeterminate sentence system in Britain stressed the origins of this system as stemming from the Australian "ticket-of leave" system<sup>14</sup>. Curiously while recommending the segregation of young first offenders, and the granting to the Attorney-General, or some other official, of a power to release such offenders conditionally or unconditionally or on parole, the Commission does not canvass the probation systems in operation in the United States, Britain and Australia<sup>15</sup>. Yet the parole system had been referred to in a debate in the Federal parliament only two years earlier, a debate which is notable for reference being made to the British legislation of 1887, without any allusion to the American models on which Britain had drawn<sup>16</sup>.

### Unofficial channels

While there are many examples of practising lawyers from one part of Canada moving to a new jurisdiction and there promoting legislation with which they were familiar in the jurisdiction of origin. However there seems to have been only one instance in which it can reasonably be inferred that there was any such direct personal transfer of information between Australia and Canada, that being the constitutional legislation in British Columbia apparently inspired by John Foster McCreight's earlier sojourn in Victoria<sup>17</sup>.

In Canada, unlike Australasia, it was relatively rare to find colonial governors who had had extensive experiences in other parts of the Empire who might suggest models for legislation which they had met during their earlier career. The one Governor who had substantial experience elsewhere in the Empire before appointment to a Canadian colony is Frederick Seymour, who had served as Assistant Colonial Secretary in Van Diemen's Land in the 1840s, and then in various capacities in diverse West Indian colonies before his appointment as Governor of British Columbia<sup>18</sup>. It is perhaps not surprising to find that Seymour occasionally drew on his earlier labours for aspects of new British Columbian law. The most notable of these is the Decimal Coinage Ordinance 1865(BC), derived from Seymour's

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<sup>12</sup> One of the curiosities of Canadian political discourse in the nineteenth century is the way in which "Australia" was used as a generic term for all and any of the Australian colonies.

<sup>13</sup> Report of Commission Appointed to Enquire into the Prison and Reformatory system of Ontario" 1891 (Ont Leg Ass Sessional paper 1891 No 18). The methodology is recounted at p6; the Australian material appears on pp 87-87.

<sup>14</sup> Ibid pp 159-59 and p173.

<sup>15</sup> Report of Commission Appointed to Enquire into the Prison and Reformatory system of Ontario" 1891 (Ont Leg Ass Sessional paper 1891 No 18), pp 220-1.

<sup>16</sup> Conditional Release of First Offenders Bill [1889] *Debates of the Senate of Canada* pp69-71.

<sup>17</sup> See below pp20-21.

<sup>18</sup> DCB vol 9, pp 711-712.

experience of West Indian law<sup>19</sup>. Other governors, such as Lieutenant Governor Edgar Dundee of Manitoba, with no such colonial background at times acquired the reputation of promoting British models for their jurisdictions<sup>20</sup>.

By contrast a feature of the Canadian legal system which had no contemporary counterpart in Australasia was the not infrequent post-confederation government practice of appointing to the bench in a province (particularly the newer provinces of British Columbia and Manitoba) of lawyers from other provinces<sup>21</sup>. This practice provided opportunity for such transplanted judges to influence legal developments in their new locales. It seems probable that when such influence was exerted, it would be used to promote adoption of laws from the judge's earlier sphere of practice and, thereby, diminish the likelihood of reformers looking beyond the bounds of Canada for suitable precedents for reform.

The personal friendships and correspondence of some influential Canadians may also have been of importance in transmitting information between colonies, although once more this seems to have been less the case than in Australasia, perhaps because it was rarer for individuals to move between colonies or provinces, and certainly rarer to see members of the same family each rising to prominence in different jurisdictions<sup>22</sup>. In addition, it would appear that prior to the federation debates, many leading figures in the respective colonies were not well acquainted with each other<sup>23</sup>. Thus in Canada, unlike the position in Australasia, personal contact between leading political figures may have had relatively little importance as a way of transmitting legal ideas from one colony to another. This may well have had the effect that an Australasian precedent adopted in one province would not easily be transmitted to any other Canadian jurisdiction.

Unofficial channels of other kinds could serve to pass on information between colonies. The New Zealand experience may have provided an example for the early officials in Vancouver's Island in other fields too, notably in the area of native policy where Douglas and other Hudson's Bay company officials attempted to follow the course charted by the New Zealand Company of disarming criticism of their land purchases by procuring an apparent cession of the land in question. Indeed Douglas used as a precedent a copy of the New Zealand Company, sent to him from London by the secretary of the Hudson's Bay Company<sup>24</sup>.

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<sup>19</sup> Seymour to Cardwell 15 May 1865 - CO60/21, despatch no 54/65. For a further example see Seymour's contribution to the Standing Orders for the British Columbia legislature, discussed below p21.

<sup>20</sup> Louis A Knafla (ed) *Law and Justice in a New Land: Essays in Western Canadian Legal History* (Carswell, Toronto 1986) p53.

<sup>21</sup> The judges concerned are too numerous to be listed here. Useful basic sources are David R Verchere *A Progression of Judges: A History of the Supreme Court of British Columbia* (UBC Press, Vancouver 1988) and D Gibson & L Gibson *Substantial Justice: Law and Lawyers in Manitoba 1670-1970* (Peguis Publishers, Winnipeg, 1972).

<sup>22</sup> One obvious exception is the Young family in the Maritimes. The correspondence in the 1850s between William and Charles Young, the former prominent in Nova Scotian affairs, the latter President of the Prince Edward Island Legislative Council is preserved in the William Young papers, Public Archives of Nova Scotia, MG2, Box 734.

<sup>23</sup> Frank MacKinnon *The Government of Prince Edward Island* (U Toronto Press, 1951) p124-25

<sup>24</sup> Foster "The *Saanichton Bay Marina* Case: Imperial Law, Colonial History and Competing Theories of Aboriginal Title" (1989) 23 UBCLR 629, 633. This account squares more accurately with the apparent record than the assertion by another writer that Douglas and his officials "regarded New Zealand Treaty policy as their model" ; see Paul Tennant "Aboriginal Rights and the Canadian Legal System: the West Coast Anomaly" in McLaren, Foster and Orloff *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American*

It is also probable that in the closing years of the century the various provinces may have been better informed about the initiatives of other Canadian, and other colonial, jurisdictions through the efforts of the Society for Comparative Legislation, which was founded in England in 1895 and quickly received publicity through official channels<sup>25</sup>, although provincial responses were not always sympathetic<sup>26</sup>. There may possibly also have been some communication of material from Australia to Canada, and vice-versa, through non-governmental organisations which had appropriate links. One such body was the Amalgamated Society of Engineers, which although primarily a British organization, did have several thousand North American members and a lesser number in Australia, complete with "American-Canadian" and "Australian" Councils for administration<sup>27</sup>.

#### (iv) Published sources

In many cases Canadian proponents of the adoption of an Australasian innovation acquired their knowledge solely from published sources. In some cases this appears to have been from official publications of colonial or Imperial governments<sup>28</sup>. In others it appears the information came through the popular press, a process which on occasion involved some real risk of inaccuracy. Thus in a debate in the Ontario legislature in 1890 on a bill to prevent "persons of tender age" (ie boys aged between seven and nine) from being sentenced to penal servitude, a Mr Meredith:

"... referred also to an interesting statement he had recently seen in a New York paper to the effect that in Australia young children convicted of a first offence were not detained in prison but were permitted to go under supervision"

with beneficial results<sup>29</sup>.

Much more accurate information was disseminated by a number of legal journals which aimed to supply the legal profession with a body of information about developments both within and outside their particular jurisdiction. The nature and function of these journals have not yet been accorded proper attention from legal historians, but it is clear they could on occasion significantly affect political debate<sup>30</sup>. Articles reporting events or developments in Australasia appear in all the contemporary legal journals outside Lower Canada – although perhaps most notably

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West (Canadian Plains Research Centre, Regina, 1992), p108. The evidence cited by Tennant for his conclusion is, to say the least, less than compelling.

<sup>25</sup> For example see Secretary of State for the Colonies to Patterson 29 November 1895 James C Patterson papers PAM MC 12 F Box 1.

<sup>26</sup> Manitoba refused to supply to the Society a requested report on Manitoba decisions on statute law, on the basis the material was available in the Manitoba reports, and the province was reluctant to commit itself to the expenditure necessary to compile the report. George Patterson, Attorney-General's Department to Provincial Secretary, n.d. but 1898, James C Patterson papers PAM MC 12 F Box 2. The foundation of the Society was noted in one of the Canadian legal journals: (1895) 15 Canadian Law Times 267-8.

<sup>27</sup> See (UK) Royal Commission on Labour (1894) 5<sup>th</sup> Report C7421, p 121. The Steam Engineers Society, a much smaller body, also had both Canadian and Australian branches (ibid p119).

<sup>28</sup> See below pp31.

<sup>29</sup> *Ontario Newspaper Hansard* 18 March 1890.

<sup>30</sup> See for example the publication in legal journals in Manitoba of articles propounding the Torrens system, discussed below pp28-29.

and regularly in the *Canada Law Journal*. That journal published in 1876 a review of two issues of the *New Zealand Jurist*<sup>31</sup>. The reviewer's comment is striking

"...It is natural to see a multitude of legal periodicals issuing from the presses of Great Britain, nor are we surprised to read the legal news of Australia in their legal journals, but seeing the *New Zealand Jurist* brings forcibly to our minds [the extent of the British Empire]"...

The review then quoted at length from the *Jurist's* criticisms of the New Zealand Court of Appeal, and of the costs and procedural difficulties in bringing appeals to it. The reviewer saw it as necessary to explain to his readers that New Zealand had a hierarchy of the District Court, Supreme Court and Court of Appeal, which suggests the colony's legal system was not well known in Canada. The *Canada Law Journal* returned to this theme in the following year with further extracts from a later issue of the *Jurist*<sup>32</sup>.

By contrast with the steady, though never substantial, flow of references to Australasia in the journals, the use of textbooks containing Australian materials would appear to be minimal or non-existent. It is not until 1881 that any Canadian legal periodical notes the publication of an Australian textbook<sup>33</sup>. To judge from the various Canadian Law reports series, in their somewhat sketchy early forms, lawyers in nineteenth century Canada did not find occasion, or need, to refer to Australian cases. This is perhaps surprising in that even the adoption of Torrens title laws did not stimulate reference to Australian cases. It is perhaps indicative of the Anglocentric nature of Canadian legal discourse that an early case book on Torrens title not only listed all the relevant statutes in the Australian colonies, Canada and New Zealand, but also included substantial material on the registration of title in England, a system quite irrelevant to the thrust of the book<sup>34</sup>. -

#### **(v) the state of Canadian knowledge of Australasian law**

It is also clear that resources for reference to, let alone thorough knowledge of, Australasian law were very limited. In only one instance, that of Ontario in 1881, do we have a complete record of the, scanty, Australasian materials available to the legislators of a Canadian province. Only in the case of New Zealand were there any materials from before 1873, but the holdings for the 1870s were thin. Various forms of legislative materials from all the Australian colonies had been received, but apparently only for limited periods and without any enduring system for acquisitions<sup>35</sup>. The total holdings for Australasia are significantly fewer in number

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<sup>31</sup> (1876) 12 *Canada LJ* (NS) 236

<sup>32</sup> (1877) 13 *Can LJ*(NS) 159 (June) quoting from the *NZ Jurist* of February 1877. Of course, publicity given to an Australasian innovation by a Canadian legal journal did not necessarily translate into any legislative action, as in 1881 when the editor of the *Canadian Law Journal* unavailingly recommended adoption of a Victorian provision designed to preserve the rights of depositors in a building society where the society had exceeded its loan limits (1882) 18 *Canada LJ* 189, referring to an article in the *Australian Law Times* of 3 September 1881

<sup>33</sup> (1881) 17 *Canada LJ* 214, quoting extracts from a review in the *Australian Law Times* of a "Mr Hamilton's" book on banking law in Australia. The review places emphasis on the Scots law basis of Australian banking law.

<sup>34</sup> W H Hunter *Torrens Title Cases* (Toronto, Carswell, 1895).

<sup>35</sup> The holdings are listed in John M Watson *Catalogue of the Library of the Parliament of Ontario* (Blackett Robinson, Toronto, 1881), pp128-29. The New Zealand holdings were Statutes 1867; Appendices to Journals of the House of Representatives 1867; Statistics for NZ 1877, Blue Book 1876. New South Wales had the largest holdings: Blue Books 1874-76; Estimates 1876-79; "Official Documents" 1875-79, and Statutes 1875-79. Other Australian holdings were: Queensland Statutes 1877, "Official Documents" 1875-79; Estimates 1879; Blue Book 1877 and Votes & Proceedings 1879; South Australia Statutes 1877; Estimates 1879; Votes & Proceedings 1879; Tasmania Journal of the House and Appendices 1876-78; Journal of the Legislative Council 1875-79; Victoria

than for Ohio<sup>36</sup> let alone the much more voluminous materials from Illinois, New York or Massachusetts<sup>37</sup>. Other colonies were less well informed<sup>38</sup>.

It must be emphasised that this paucity of Australian material was matched, in at least the smaller Canadian jurisdictions, by the deficiencies in the holdings of English and, on occasion even Canadian, material<sup>39</sup>.

In some cases Canadian lawyers found that their knowledge of developments in Australasian jurisdictions as imperfect, a matter which was sometimes a little embarrassing. The prime example is furnished by the Commission set up in 1895 to revise the statute law of British Columbia. The Commission was intended not merely to collate and revise the existing statute of law of British Columbia, but also to recommend other new provisions where there were gaps in the law, and to set out the Imperial statutes in force in the colony, or those that should be adopted, in a form in which British Columbia could enact them itself. It seems the authorities erroneously believed that in the latter part of their tasks they could derive assistance from New Zealand. Theodore Davie, the Attorney-General, in a preface to the Report, put the position thus:

When it was decided by the Legislature to enter upon this revision, it was believed that a similar work said to have been carried into execution in the Colony of New Zealand would afford a precedent and much facilitate the labours of the Commission, but it appears that no such revision has been carried out there. The 'Revision of Statutes Act 1879'(NZ) directed that the Commission appointed under that statute should include in a new edition of statutes "such enactments of the Imperial parliament in force in this Colony as from their general interest and importance the Commission may think it desirable should be so included". The New Zealand Commissioners therefore collected, without revision or change, certain Imperial statutes occupying a book of about 500 pages<sup>40</sup>.

It is notable that in the draft report, the remedies proposed for gaps in the law of British Columbia were sometimes drawn from other Canadian jurisdictions, as well as

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Acts 1875-78; Votes & Proceedings of the Legislative Assembly 1876-78; Votes & Proceedings of the Legislative Council 1876-78; Western Australia Blue Book 1876 and Votes & Proceedings of the Legislative Council 1875-76.

<sup>36</sup> Ibid, p.153.

<sup>37</sup> The substantial American holdings had apparently been assembled as a matter of policy, as eight years earlier the Parliamentary Librarian had recommended the acquisition, by purchase or exchange of the statutes of the United States; Illinois; Massachusetts; Pennsylvania and Ohio Report of Parliamentary Librarian, S Warren, 17 May 1873, Archives of Ontario RG4-32, File 1873 C1047.

<sup>38</sup> In Manitoba the Law Society library contained many volumes from various Canadian and American jurisdictions, and much on English law, but as late as 1891, no material at all from Australia, new Zealand or other parts of British Empire, see Annual report of Manitoba Law Society Librarian for 1892, Public Archives of Manitoba P1379 file A 714.

<sup>39</sup> In Manitoba in 1885 the Legislative Assembly Library possess no British Hansard or statutes from later than 1870 ; 1886 Second Annual Report of Legislative Assembly Library 1886, in Sessional Papers 1886, Public Archives of Manitoba GR174 OS 13-2. Nor did the provincial authorities receive any copies of Dominion legislation through official channels between 1869 and 1871 : Adams G Archibald to Secretary of State for the Provinces 6 July 1872, Adams G Archibald papers, Public Archives of Manitoba MC 12 A 1. Manitoba may have been better off than Nova Scotia, which in 1875 apparently did not have in its legislative library even the recorded debates of the Dominion parliament : (1875) *Debates of the Nova Scotia House of Assembly* p67 (1 April 1875).

<sup>40</sup> *First Draft Report of the Commissioners appointed to Revise the British Columbia Statutes* (Government Printer, Victoria BC, 1896) p1 A clear determination of the United Kingdom statutes in force in New Zealand had to await the Imperial Laws Application Act 1888 (NZ).



from English law<sup>41</sup>. However, perhaps because the task was so much greater than anticipated, no legislation resulted.

### 3 Three case studies

It is necessary now to turn to three larger case studies in which the overall impact of borrowings from, or regard to, Australasian law on across a number of Canadian jurisdictions can be considered. The first of the three cases studies discusses the law relating to gold mining, both in British Columbia (in which context it has already received scholarly notice) and in Eastern Canada (where no such analysis has been made). The second case study concerns the broad field of constitutional and electoral law. It is clear that in this area little scholarly attention has been paid to the importance of Australasian law and practice as a source of constitutional provisions, and, more importantly, as an exemplar of improved practices, particularly in the use of the secret ballot. Lastly attention is turned to land law, and in particular the adoption of the Torrens system of registration of titles to land. There has been a substantial, if not always accurate or consistent, body of writing acknowledging the Australian origins of this law, but little attention has been paid to significant aspects of the process whereby Torrens title was adopted.

#### (i) Gold mining and related legislation

It has long been known that the early gold fields legislation in British Columbia, starting with the Gold Fields Act 1859(BC) was derived in large part from Australasian models<sup>42</sup>. The authorship of this most important Act has been ascribed to the then Chief Justice of British Columbia, Matthew Baillie Begbie. The most substantial account to date is that of Begbie's biographer, D R Williams, who quotes an important letter from Governor Douglas to Sir Henry Barkly, then Governor of Victoria in which Douglas stated that the British Columbian Gold Fields Act 1859 was drawn from the New Zealand Gold Fields Act 1858, which in turn Douglas stated had been drafted with the benefit of Victorian and New South Wales experience:

"... The precedent chiefly followed was the New Zealand Code, which in fact had, equally with this colony, the benefit of the previous legislation of Victoria and New South Wales. And in addition to the New Zealand Code of which a copy had been procured portions of the Codes of Victoria and New South Wales were also consulted, though only portions of those not of the latest dates were procurable." <sup>43</sup>

The historical record here is adequate to trace the route by which Begbie learnt the New Zealand act could furnish a useful precedent. Most unusually, the process involved the intervention of the Colonial Office, which had despatched to Douglas a copy of the New Zealand Act in April 1859<sup>44</sup>. Lastly, it should be noted that by 1860,

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<sup>41</sup> The Commission recommended a new master and servant law (as the Supreme Court had held the British statutes did not apply) taken from Ontario law, as well as a draft Factors Act which mixed three Imperial statutes with an Ontario statute, and a draft Execution Act which included a provision from Manitoba law. *First Draft Report of the Commissioners appointed to Revise the British Columbia Statutes* (Government Printer, Victoria BC, 1896) p2.

<sup>42</sup> Tina Loo, *Making Law, Order and Authority in British Columbia 1821-1871* (U Toronto Press, Toronto 1994), p61.

<sup>43</sup> Williams, David R. *"The Man for a New Country" : Sir Matthew Baillie Begbie* (Gray's Publishing Co, Sidney BC, 1977), 151, quoting from W Trimble *The Mining Advance into the Inland Empire: a comparative study of the beginning of the mining industry in Idaho and Montana* ( University of Wisconsin Bulletin 638, 1914) p337. Douglas's statement must, however, be read with some caution, as it under-estimates the Victorian influence on the New Zealand law. The New Zealand Act of 1858 in fact replicated the Goldfields Ordinance 1858 of Nelson Province, which itself was effectively a transcript of the Victorian statute of 1856: Jeremy Finn "The Intercolonial Element in Colonial Statute Law" (PhD thesis, University of Canterbury, 1996) pp 29-30.

<sup>44</sup> See Douglas to Bulwer Lytton 4 July 1859 CO60/4, despatch no 184/59.

the British Columbian authorities had received from Barkly a substantial body of information about Victoria's gold fields which, though arriving too late to be used for the 1859 statute may well have been of real assistance in later years<sup>45</sup>.

It is worth noting that at least some knowledge of English mining law was also available to the authorities in the early days of British Columbia, as one local lawyer, Henry Pering Pellew Crease, who practised in Victoria from 1858 had had the unusual distinction of both being called to the Bar in England and later managing a tin mine in Cornwall<sup>46</sup>. The resort to Australasian models for the British Columbian gold fields law is therefore likely to have been a positive choice to adopt another colonial model, rather than draft new legislation or adopt some provision of English law.

It must be noted that reference to Australasian precedents continued for some time in British Columbia, though not all such derivative legislation was successful. In 1865 the British Columbia government levied a duty on gold produced, a move which excited such resistance that the Ordinance levying the duty was repealed a year later. The origins of the 1865 ordinance cannot be fully determined, though it appears it may have owed something to earlier suggestions from the Colonial Office<sup>47</sup>. It also seems probable that regard was had to New South Wales legislation creating such a duty<sup>48</sup>. More unusually, perhaps, in 1866 British Columbia adopted the system of compulsory miners' licences which had been experimented with, and abandoned, in Australia, but the British Columbian authorities indicated that the system had been instituted at the request of the local miners. It is a reasonable assumption that the miners requesting the system were acting from what they perceived to be reliable information as to the Australian system<sup>49</sup>. There may have been some further Australasian influence on British Columbian mining law after the mid-1860s, but the records are insufficient to determine how extensive any such influence was. It appears that in at least one later debate Australian usage was cited during debates on legislation<sup>50</sup> but it cannot be determined whether this is an isolated example. They may also have been a significant if immeasurable Australian contribution to the unusually pacific ethos and the law of the British Columbian goldfields as many miners who had worked on Australian, and Californian, goldfields, rejected the more violent ethos of the American and Australian diggings<sup>51</sup>.

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<sup>45</sup> Douglas to Barkly 6 August 1860 quoted in Trimble op cit n76. This passage is not referred to by Williams, op cit n76, who, at p151, quotes other parts of the letter.

<sup>46</sup> Dictionary of Canadian Biography, vol 13, p 229.

<sup>47</sup> Governor Seymour noted in a despatch to the Secretary of State for the Colonies enclosing the British Columbian legislation for 1865 that the levying of a duty had been suggested in 1859 by both Sir Henry Bulwer Lytton and the Duke of Newcastle during their respective terms in control of the Colonial Office: Seymour to Cardwell 19 May 1865 CO60/21, despatch no 57/65. It cannot now be determined whether these Ministers were influenced by Australian precedents for their suggested law, but it would seem highly probable this was the case.

<sup>48</sup> In BCARS GR 675 (titled "Drafts for new Mining Act" but in fact containing material relevant to mining legislation over many years) there exists a handwritten copy of the 1855 Gold Duties Act (NSW). It is a reasonable surmise that it was drawn on for the British Columbian law.

<sup>49</sup> As to this see Birch (Administrator) to Cardwell 3 April 1866 CO60/24 despatch no 29/66, commenting on the Licences Act 1866.

<sup>50</sup> See notes by Henry Crease of speeches at the Committee stage of Mineral Ordinance 1869 (BC) in BCARS GR673/4 Box 3.

<sup>51</sup> John McLaren, Hamar Foster and Chet Orloff "Law for the Elephant, Law for the Beaver: Tracking the Beasts" in Foster, McLaren and Orloff *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West* (Regina, Canadian Plains Research Centre, 1992) p5.

Although the British Columbian experience has been the subject of some extensive discussion, little or nothing seems to have been written on the history of mining law in other Canadian provinces in the latter part of the nineteenth century. It is clear that when and if this area of law receives a detailed study, attention will have to be paid to the influence of Australasian law. The first instance of reference to Australian law which was discovered comfortably pre-dates the gold rush period in British Columbia, and is to be found in New Brunswick during debates on the Mining Leases Bill 1852, a bill intended to ensure that where the Crown granted or sold land, the mineral rights went with the surface rights by restraining the Crown from granting mining leases in respect of lands previously granted or sold). During the debate on the Mining Leases Bill, the Surveyor-General is reported to have said that in Australia mineral rights had formerly been reserved to the Crown but that had been done away with "in the manner contemplated by this Bill"<sup>52</sup>. At an earlier stage of the debate a Captain Robinson had spoken in favour of the Bill but the report, frustratingly, contains only an editorial note that "The Honourable member made some references to incidents relating to the gold mines of Australia, which we did not clearly hear"<sup>53</sup>. It is clear that the New Brunswick legislators were aware that the issue had been canvassed in Australia, though the record is severely limited and it is impossible to discover to which of the Australian colonies their knowledge related. After some years, New Brunswick adopted a system under the Mines and Minerals Act 1855 whereby rights to minerals were vested in the grantee of land, but such a grantee requires a license from the Crown to mine the land<sup>54</sup>.

In Nova Scotia the influence of Australian precedent was very considerably greater. Gold was discovered there in 1861, a discovery which caused a small-scale gold rush within the colony. The appeal of the gold fields was limited because, unlike the alluvial gold of the British Columbia fields, Nova Scotia's gold was locked in seams in quartz rock. Mining it was therefore a relatively capital intensive business. At the time of the first findings of gold, Nova Scotia had no appropriate mining law – the only statute on the books being concerned with coal mines, and in terms unsuitable for regulating gold mines. The short-term response of the Government was to control gold mining on public lands by regulations passed by the Governor-in-Council and to make "amicable arrangements" with landowners on whose land mining was taking place<sup>55</sup>. The Government appears to have been guided, in this early period as in later years, by the experience of local residents who had themselves participated in the Californian and Australian rushes<sup>56</sup>. It is curious that none of the official documents of 1861 (unlike those of later years) refer to the British Columbia gold fields – perhaps even more curious is the attempt by the Nova Scotia government to recruit from England an expert adviser on gold mining<sup>57</sup>. In the following year, more formal controls were enacted in the Gold Act 1862(NS), which

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<sup>52</sup> 1852 *New Brunswick Legislative Assembly Debates* p206 (18 March 1852).

<sup>53</sup> 1852 *New Brunswick Legislative Assembly Debates* p197 (15 March 1852).

<sup>54</sup> See Charles Fisher, n.d. enclosed with Manners-Sutton to Russell 27 June 1855 CO188/24 despatch no 55/55.

<sup>55</sup> Joseph Howe, Provincial Secretary to Mulgrave 4 September 1861, enclosed with Mulgrave to Newcastle 4 September 1861, CO217/228 despatch no 63/61.

<sup>56</sup> Joseph Howe, Provincial Secretary to Mulgrave 4 September 1861, enclosed with Mulgrave to Newcastle 4 September 1861, CO217/228 despatch no 63/61; Mulgrave to Newcastle 2 October 1861, CO217/228 despatch no 68/61.

<sup>57</sup> Mulgrave to Newcastle 4 September 1861, CO217/228 despatch no 63/61.

“...was framed partly from experience of ...[1861] and partly from the examples of similar legislation in Victoria and British Columbia”<sup>58</sup>.

The Gold Act 1862 proved to be not entirely satisfactory, and was re-drawn in 1863, in particular with the abandonment of a fee per claim and a mover instead to a royalty on gold produced<sup>59</sup>.

Ontario's mining law may also have been significantly influenced by Australasian law, though the period in which such influence took place is rather later, and the process appears to have been very differently mediated in that the necessary information was largely garnered by the efforts of a Royal Commission on the Mineral Resources of Ontario in 1890. Although Ontario inherited a Gold Mines Act from the United Provinces of Canada<sup>60</sup> and also passed a further Act in 1868, the major period of legislation is in the 1890s, and many of the initiatives then taken reflect the recommendations of the Royal Commission. That Commission had surveyed the mining laws of much of the world<sup>61</sup>. The Royal Commission recommended a number of changes to the current mining law of Ontario, although it started with a firm espousal of the need to ensure that the mining law was in accord with the system of land tenure then prevailing in the province:

“it may be that tenure in fee simple is not the best. The lease system has strong advocates among the friends of so-called land law reform, and it is on trial on a large scale in New Zealand and in the Australian colonies. But in Ontario where the great majority of occupiers are owners, it would be difficult to persuade people that any other system is better. The merits of the lease system were carefully weighed before the adoption of the first mining regulations, and in all the changes made since that time the only approach to the adoption of that system is found in the licensing provisions relating to mining claims in mining divisions, in which respect it has failed altogether”<sup>62</sup>.

Three recommendations were made for changes to the provincial mining law. The first concerned the perennial problem of non-exploitation of possible mines. It was commonplace for speculators to purchase lands believed to have some potential for mining but to refrain from any development work until neighbours had, at considerable cost, determined whether the potential was likely to be realised. If the neighbour's exertions showed minerals worth exploiting, the speculator would then be able to raise finance easily for a mine, or sell the land. Pressure for change came both from frustrated would-be miners and from those landowners who had spent money on proving the land's potential, or lack of it, only to see the speculator take advantage of the miner's expenditure. The Commission's view was :

“ A number of witnesses examined before the Commission have recommended a change in the law whereby parties holding mineral tracts in a state of idleness

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<sup>58</sup> Report of Attorney-General, Adams G Archibald, 14 July 1862, enclosed with Mulgrave to Newcastle 23 July 1862, CO217/230 despatch no 66/62.

<sup>59</sup> Mulgrave to Newcastle 4 March 1863 CO217/232 despatch no 20/63. This despatch, and its enclosures, are interesting for their inclusion of technical and statistical material drawn from Victoria.

<sup>60</sup> Gold Mines Act 1864(UC).

<sup>61</sup> The Report discusses, inter alia, the mining laws of three other Canadian provinces (Quebec, Nova Scotia and British Columbia; British Columbia as well as the Dominion laws and then summarises the law in the United States (both federal Acts and some state laws), as well as a Great Britain and Ireland, New Zealand, the Australian colonies and France, Germany, Austro-Hungary, Italy, Belgium, Portugal, Spain, Sweden and Norway. Royal Commission on Mineral Resources of Ontario 1890 (Warwick & Son, Toronto, 1890) pp255ff.

<sup>62</sup> Royal Commission on Mineral Resources of Ontario 1890 (Warwick & Son, Toronto, 1890) pp301. The failure of the mining claims system was considered to be because people who could afford to buy 80 acres of land would not settle for a leased claim of a mere 200ft square.

should either be forced to begin and carry on mining operations themselves, or concede the right of mining to others upon a royalty. But both of these plans are open to the objection of interference with vested rights and therefore contrary to the genius of our legislation. The best and perhaps the only remedy for the evil would seem to be that which has been adopted in New Zealand and South Australia, viz., the resumption of such unworked lands by the government as are believed to be valuable for mining purposes, upon payment of a reasonable compensation and holding them for re-sale subject to development conditions"<sup>63</sup>.

Amendment on these lines, and thus apparently prompted by Australasian practice, did occur in the following year, with the General Mining Amendment Act 1891(Ont) providing that where no adequate effort was made to exploit possible minerals in the first seven years, the mineral (but not the agricultural) rights reverted to the Crown. The statutory requirements do not appear at this distance to be particularly onerous – they required expenditure on materials or labour ( or the owner's own exertions in lieu of paid labour) of \$5 per acre if the land in question was 160 acres or less; the requirement dropped to \$4 per acre if the land exceeded 160 acres. A similar provision was included in the Mining Act 1892(Ont)<sup>64</sup>. Further recommendations of the Commission which drew attention to Australasian law or practice were later to influence new legislation in the area. One recommendation noted that there was little provision in the Ontario law for health and safety of miners, and suggested that this deficiency should be remedied, saying that "the British and New Zealand regulations are valuable models of this kind of protection"<sup>65</sup>. Reform came quickly, as later in that year the Ontario legislature enacted the Mining Regulations Act 1890 (Ont) which enacted limitations on the employment of women and children in mines, and also required a large number of matters be addressed to ensure greater mine safety. It is not clear how far the new Act actually followed New Zealand practice. Certainly the scanty reportage of the debates hints that local legislators may have had more willingness to follow the English legislation rather than that of any other colony<sup>66</sup>. Secondly there was the vexed question of the state's role in promoting mining, and how best this might be done. While the Commission was of the opinion that it was proper for the state to encourage exploration for, and exploitation of new mineral deposits, it might not be desirable to follow the New Zealand practice of subsidising exploration and offering rewards for new discoveries ( on the basis that this might encourage fraud), but at the least the Government should make information more readily available to prospectors and miners<sup>67</sup>. These issues were addressed in the Mining Act 1892 which not only set up a new Bureau of Mines with a role, inter alia, of disseminating information, but also attempted to stimulate exploration by giving to discoverers of new deposits a 15 year exemption from liability for royalties on minerals mined. Lastly the Commission recommended consideration be given to the setting up of a School of Mines. It is noteworthy that in its discussion of mining education, the Report devoted eight of 30 pages to the New Zealand School of

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<sup>63</sup> Royal Commission on Mineral Resources of Ontario 1890 (Warwick & Son, Toronto, 1890) p305.

<sup>64</sup> Section 14(6).

<sup>65</sup> Royal Commission on Mineral Resources of Ontario 1890 (Warwick & Son, Toronto, 1890) p306

<sup>66</sup> See *Ontario Newspaper Hansard* 10 March 1890, where some members of the Opposition wanted the making of returns to be compulsory "as in the English Act".

<sup>67</sup> Royal Commission on Mineral Resources of Ontario 1890 (Warwick & Son, Toronto, 1890) p302.

Mines<sup>68</sup>, although it may perhaps be thought this place of honour may have been more the result of the School forwarding a large volume of material than of any intrinsic superiority of the School's curriculum. In 1891 the Ontario legislature opted for a low-cost solution by authorising local authorities to set up Schools of Mines, without itself setting up a Provincial School<sup>69</sup>.

## **(ii) Electoral and constitutional law**

One area of law in which Australasia considerably influenced Canadian developments which has so far largely escaped study by historians is the broad field of constitutional and electoral law. By far the predominant influence in this regard is in relation to the adoption of the secret ballot but, as will be seen, interest in Australasian precedent was considerably more widespread than that.

The most striking examples of direct borrowing of Australasian law in this field are to be found in British Columbia. As that colony prepared for accession to the Confederation of Canada, there was a flurry of legislative activity aimed at ensuring the new province had suitable constitutional and electoral laws in place. It is clear that in drawing up these laws the British Columbian authorities had a reasonably substantial knowledge of precedents from other colonies. The Constitution Act 1871 (BC) was primarily derived from the federal legislation, but at least two sections were based on Victorian law. Section 43, which provided that no act of the legislature was invalidated because a district had failed to elect a member or because the election of a member was later found to be void, was drawn from the Victorian Constitution Act<sup>70</sup>, and a later section, allowing the legislature to define by statute its powers and privileges had been drawn from the Victorian act and also the British North America Act 1867 (Imp)<sup>71</sup>. A third provision requiring the appointment of public officers to be made solely by the Governor acting on the advice of the Legislature was also apparently drawn from the Victorian statute<sup>72</sup>. Other legislation of the same year in the same field which reveals some Australian element include the Corrupt Practices Prevention Act 1871<sup>73</sup> and the Electoral Regulation Act 1871<sup>74</sup>. The breadth of research into colonial precedent that had occurred at this point is best evidenced by a memorandum, apparently prepared in connection with the drafting of the Qualification and Registration of Voters Act 1871 (BC), which listed the relevant requirements in New South Wales, Natal, Vancouver Island, South Australia;

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<sup>68</sup> Royal Commission on Mineral Resources of Ontario 1890 (Warwick & Son, Toronto, 1890) pp513-521 of the relevant section, which appears on pp491-521.

<sup>69</sup> Act for Mining Schools 1891 (Ont).

<sup>70</sup> See BCARS GR 673 Box 6, Draft of Constitution Act 1871, marginal note to s7.

<sup>71</sup> See BCARS GR 673 Box 6, Draft of Constitution Act 1871, marginal note to s444.

<sup>72</sup> J G Philippo, Attorney-General, enclosed with Musgrave to Kimberley 18 February 1871, CO 64/43 despatch no 13/71.

<sup>73</sup> Musgrave to Kimberley 5 April 1871, CO 64/43 despatch no 40/71, repeating (without acknowledgment) J G Philippo's draft memorandum to Governor 1 April 1871 BCARS GR674 Attorney-General of BC's Papers 1871. This document indicates that while the Corrupt Practices Prevention Act 1871(BC) was based on the English Act (17&18 Vict c102) the "7<sup>th</sup> and 8<sup>th</sup> sections however have been adapted from the law in force in Canada and Australia". See also GR673 Attorney-General's Papers; Bills Box 6.

<sup>74</sup> Victorian law provided two aspects of this Act, firstly a provision allowing adjournment of an election ballot in the case of violence or riot (see Musgrave to Kimberley 5 April 1871, CO 64/43 despatch no 40/71) and a prohibition on personation of voters, though the rest of the statute largely replicates the law of the colony of Canada prior to confederation, see J G Philippo draft memorandum to Governor 1 April 1871, BCARS GR674 Attorney-General of BC's Papers 1871.

Queensland, Prince Edward Island, New Zealand, Cape Colony, Antigua, Jamaica, Canada, Victoria and Manitoba<sup>75</sup>. It is not clear, however, that any one colony was used as a precedent for the British Columbian Act.

The occurrence of this rather intense episode of borrowing from other colonial sources naturally encourages an investigation as to the backgrounds of the key figures of the period to see if a likely channel for information and inspiration can be found. In this case the obvious candidate is John Foster McCreight<sup>76</sup>, an Irish barrister who had practiced at the Victorian bar from 1843 to 1859, before migrating to Vancouver's Island in 1860 and practising there and in British Columbia for some years. McCreight later was active in politics, and became the first premier, and Attorney-General, under responsible government in 1871. Although McCreight was not in office at the time of the various electoral and constitutional enactments, it is clear he was in a position to advise and influence the then Attorney-General John Philipppo. Furthermore, McCreight had an authoritative and direct source of information as to Victorian law through his cousin, William Foster Stawell, quondam Attorney-General of, and later Chief Justice of, Victoria.

It should be noted that a leading colonial figure's experience in another colony affected the law of British Columbia in a related field. In 1865 Governor Seymour had a substantial hand in the framing of the Standing Orders for the British Columbia Legislative Council, orders which were modeled on those Seymour had "... assisted in framing for the House of Assembly of British Honduras"<sup>77</sup>.

The most widespread references to Australian law come in the various debates on the use of the ballot in elections. Some insight into the diverse routes by which information as to Australasian law and practice came to the notice of Canadian legislators is furnished by an debate in the Federal legislature in 1871 on the use of the ballot in elections. One speaker, a Mr Dodge, claimed to have personally witnessed the operation of both the open voting system in England and the ballot in Australia and the United States<sup>78</sup>. Another supporter of the ballot, a Mr Witton, also referred to the Australian experience, but his information was avowedly derived

"...from the records of Commissions appointed in England to investigate the results in the Colonies in which the system of the Ballot prevailed"<sup>79</sup>.

Witton would appear to have been referring to the Select Committee of the British House of Commons which reported in 1869 on election by ballot. The report contained reports by the various Australian Governors on the operation of the ballot in their colonies.

It appears too that the Nova Scotia Ballot Bill 1869 was derived in part, at least, from Australian law. The abbreviated report of the debates records :

"Dr Brown asked what act the bill was copied from. The Chairman explained that it was framed from the New Brunswick , the Australian and some of the United States Acts"<sup>80</sup>.

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<sup>75</sup> J G Philipppo, draft memorandum, n.d. BCARS GR674 Attorney-General of BC's Papers 1871,

<sup>76</sup> The most useful source is Patricia Johnston " McCreight and the Law " (1948) 12 *BC Hist Quarterly* 127, though fragments appear in Patricia Johnston "John Foster McCreight" (1948) 12 *BC Hist Quarterly* 79.

<sup>77</sup> Seymour to Cardwell 15 March 1865 CO60/21, despatch no 25/65.

<sup>78</sup> (1871) *Debates of the Canadian House of Commons* p73 (3 April 1871).

<sup>79</sup> (1871) *Debates of the Canadian House of Commons* p61 (3 April 1871).

<sup>80</sup> (1869) *Debates of the Nova Scotia House of Assembly* 156 (8 June 1869).

In New Brunswick, the ballot was initially adopted for elections to the legislature because of success with it in municipal and local elections<sup>81</sup>. It is, however, important to note that the parallels between Australian and Canadian provincial electoral law are not as close as might be thought from the frequent references to the adoption of 'the ballot'. As an unusually well-informed debate in the New Brunswick legislative assembly in 1865 shows, the "Australian" ballot involved not merely the casting of votes by ballot, but the prevention of improper influence on the elector before the ballot was cast. As one speaker put it:

"..In Australia they have a good plan. A voter gets a ballot, passes through a room and deposits it and he is not allowed to be spoken to or interfered with from the time he gets his ballot till he has put it in the box. Some such system might answer here."<sup>82</sup>

Other legislators were much less complimentary about election by ballot. One such was the simplistic view "I don't like the ballot. I don't think it is British"<sup>83</sup>. Even where the ballot was supported, often appeals to overseas examples were considered to be less likely to impress than local experience. Consider the argument put in 1871 in Nova Scotia for the retention of election by ballot:

"The system works well in New Brunswick, in the United States and Australia, it has been proposed to be introduced in England and throughout the Dominion and it is acted upon in the City of Halifax"<sup>84</sup>.

By comparison, in the more conservative and oligarchic society of Prince Edward Island, the secret ballot was adopted only because of the use of that system in Dominion elections, and even in the legislative debates on the measure there was but one reference to jurisdictions more distant than the neighbouring provinces of Nova Scotia and New Brunswick<sup>85</sup>.

In Ontario the introduction of the secret ballot for provincial elections, although initially moved as a private member's bill<sup>86</sup>, received government support. In his speech on the second reading of the necessary bill Oliver Mowat did refer to the ballot as having been "... adopted in some of the most important Colonies of the British Empire"<sup>87</sup>, the remainder of the debate focussed on experiences and practices in Canada and the United States. Only in Manitoba was Australian influence not marked, as Manitoba appears to have drawn from Dominion legislation and, in places, English law<sup>88</sup>.

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<sup>81</sup> Report on Elections Act 1855 (NB), Charles Fisher, n.d. enclosed with Manners-Sutton to Russell 27 June 1855 CO 188/24 despatch no 55/55. The ballot was introduced for municipal elections by the Municipal Elections Act 1851(NB).

<sup>82</sup> (1865) *New Brunswick Legislative Assembly Debates* p24 (3 May 1865).

<sup>83</sup> Mr Lewis, (1865) *New Brunswick Legislative Assembly Debates* p24 (3 May 1865).

<sup>84</sup> (1871) *Debates of the Nova Scotia House of Assembly* p253 (22 March 1871).

<sup>85</sup> See for example (1877) *Debates of the PEI Legislative Council* pp160ff. (16 April 1877). It appears that during an 1862 debate on the qualification of electors, a Mr Hensley referred to the Legislative Council franchise in Cape Colony (on the authority of *Martin's British Colonies*); see the anecdote to this effect reported in *Debates of the Prince Edward Island Legislative Council* p81 (19 March 1881). There may well have been other occasions which were not preserved in what is a very meagre historical record.

<sup>86</sup> See *Daily Globe*, Toronto 16 January 1874.

<sup>87</sup> (1874) *Newspaper Hansard of Ontario* 12 February 1874.

<sup>88</sup> A manuscript copy of the Election Act 1891 Manitoba indicates sections were drawn not only from an earlier Manitoba statute but also from "RS Canada c8" and "51 Vic (Dom) c11 s15". Public Archives of Manitoba GR207 Manuscript Bills and Original Bills. The Controverted Elections Bill 1872 (Man) was taken from the English



While the majority of Canadian references to Australasian constitutional and electoral law come in the discussions of the ballot, they were not limited to that field. During the debates on confederation, many Canadians made reference to the New Zealand constitutional structure, and the distribution of powers provided for in the New Zealand Constitution Act 1852. Leading federalists such as Tupper and John A Macdonald wanted to ensure that confederation should be on terms that all powers not specifically given to the provinces were in the central legislature<sup>89</sup>. In trying to justify the proposed federal constitution to Canada West sceptics, Macdonald made reference to the New Zealand position where provincial councils and superintendents were clearly subordinate to the central legislature and thereby to the central executive. Contemporaries detected the falsity of the analogy, which lay in the quite different size and nature of the larger Canadian entities – the population of Canada West being greater than that of all of New Zealand<sup>90</sup>. It is notable that the discussion appears to have been largely in terms of the structure provided by the Imperial statute, with little if any discussion of the experience of the operation of the New Zealand.

The last occasion of appeal to Australasian precedents in electoral matters appears to have come in Nova Scotia with various proposals, all unsuccessful, for some form of franchise for women. The first proposal, for an extension of the franchise to women possessing an appropriate property qualification<sup>91</sup>, was in 1881, with further attempts in 1884, 1886, 1887 and 1891 and 1892<sup>92</sup>. In none of these instances did the proponents of female suffrage look to Australasian precedents (which indeed were at that time unfavourable), preferring to point to isolated cases of female suffrage in municipal elections in America, England and other parts of Canada. A major change occurs with the success of women's suffrage movements in American and Australasian jurisdictions, as these successes were urged upon more conservative legislators as both examples to be followed and proof that the consequences of female suffrage would not be some form of social revolution. Thus in 1893, much was made of the adoption of female suffrage in Wyoming<sup>93</sup>. For the rest of the century, with bills in 1894, 1895 and 1897, Wyoming again featured in the debate, but the proponents of change were quick to seize upon developments in New Zealand and, later, South Australia. The mover of the bill for female suffrage in 1894, a Mr Hemeon, devoted a substantial part of his speech to a recitation of such matters as New Zealand's population (slightly greater than that of Nova Scotia), its rate of school attendance and even the number of its newspapers, in an attempt to

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statute; Adams G Archibald to Secretary of State for the Provinces 6 July 1872, Adams G Archibald papers, Public Archives of Manitoba MC 12 A 1.

<sup>89</sup> P B Waite *The Life and Times of Confederation 1864-67: Politics, Newspapers and the Union of British North America* (U Toronto Press, 1962) pp 96 and 204.

<sup>90</sup> *Ibid.*, pp285-287.

<sup>91</sup> It should be remembered that the law relating to married women's property was such that few, if any, married women would have met any property franchise, so the proposed franchise would effectively have been restricted to unmarried women and widows.

<sup>92</sup> Only the earlier debates are reasonably comprehensively reported, see (1881) *Debates of the Nova Scotia House of Assembly* p113 (7 May 1881); (1884) *Debates of the Nova Scotia House of Assembly* pp 142-143 (28 March 1884) and (1886) *Debates of the Nova Scotia House of Assembly* p 501 (10 May 1886).

<sup>93</sup> (1893) *Debates of the Nova Scotia House of Assembly* pp201 ff (10 April 1893). In that year, for the first time, a bill for female suffrage passed the House of Assembly only to perish in the Legislative Council. No other bill was so successful for many years.

show New Zealand was a polity deserving of respect and imitation<sup>94</sup>. In 1895, in another unsuccessful mover's speech, Hemeon returned to the tactic of mentioning American jurisdictions first, but then drew once more on the example of New Zealand "... which was a country always in the forefront in everything relating to civilization and progressive government."<sup>95</sup>

He was however quick to disavow any suggestion that female suffrage led to women becoming parliamentarians<sup>96</sup>. His supporters were equally quick to suggest the New Zealand experience showed that the impact of female suffrage would be for the better, because female voters were both more conscientious and more conservative than their male counterparts<sup>97</sup>.

### (iii) Land law – Torrens and other things

By far the best known single Australian contribution to the law of Canada is the Torrens system of registration of title to land. It must be said that although the basic fact of Australian influence has been long known, the various writings on the particular statutes are far from well-informed or consistent as to the course of events. Nor was Torrens title the first aspect of land law where an Australasian model was of some importance. The first land regulations promulgated in Vancouver's Island reflected the principles underlying the Wakefield system, with distinctions being drawn between town, suburban and country lots, each to be of a particular size and in a fixed ratio one to another. The first Colonial Surveyor, Joseph Despard Pemberton

"... arrived in Victoria [Vancouver's Island] with a detailed knowledge of the land laws and survey systems of New Brunswick, Prince Edward Island, South Australia, New Zealand and seven other colonial locations"<sup>98</sup>.

The form of the Vancouver's Island land regulations owes much to the Australasian precedents with which Pemberton was familiar<sup>99</sup>. However the Wakefield theory could not be put into practice successfully in the fledgling colony, because of a dearth of good agricultural land<sup>100</sup>. The consciousness of New Zealand precedent may well have been fostered by the interest shown by the powerful advocacy of James Edward Fitzgerald who not only promoted the Wakefieldian settlement of Canterbury in the South Island of New Zealand but intermittently sought to set up a similar colony on Vancouver's Island<sup>101</sup>.

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<sup>94</sup> (1894) *Debates of the Nova Scotia House of Assembly* pp125 ff (24 January 1894).

<sup>95</sup> (1895) *Debates of the Nova Scotia House of Assembly* pp85 (6 March 1895). Hemeon also referred in this speech to the recent adoption of female suffrage in South Australia.

<sup>96</sup> (1895) *Debates of the Nova Scotia House of Assembly* pp86-7 (6 March 1895).

<sup>97</sup> See (1894) *Debates of the Nova Scotia House of Assembly* pp127 (24 January 1894) and (1895) *Debates of the Nova Scotia House of Assembly* 126ff (13 March 1895).

<sup>98</sup> Richard Mackie "The Colonization of Vancouver Island" *B C Studies* 96(1992) 3, 19.

<sup>99</sup> Hamar Foster "British Columbia: Legal Institutions in the Far West from Contact to 1871" (1996) 23 *Man LJ* 292, 297.

<sup>100</sup> Richard Mackie "The Colonization of Vancouver Island" *B C Studies* 96(1992) 3, .37.

<sup>101</sup> See J S Galbraith "James Edward Fitzgerald versus the Hudson's Bay Company: the Founding of Vancouver's Island" (1952) 16 *BC Hist Quarterly* 191 and Paul Knaplund "Letters from James Edward Fitzgerald to W E Gladstone covering Vancouver's Island and the Hudson's Bay Company 1858-50" (1949) 13 *BC Hist Quarterly* 1 and Tina Loo, *Making Law, Order and Authority in British Columbia 1821-1871* (U Toronto Press, Toronto 1994) p38, where it is suggested British Columbia was also intended to be settled on the Wakefield model.

Early land registry laws passed in Vancouver's Island (in 1860) and British Columbia (1866) although both derived from other jurisdictions, but were very different in kind. The origins of the Vancouver's Island statute have been somewhat misrepresented in some writings. One writer<sup>102</sup> has described the statute as something of a hybrid of English and Torrens principles, created by a draftsman who had been sent the South Australian statute of 1858 by the Colonial Office (though at whose instigation is not known). There is, however, nothing in the relevant archival record to substantiate this account in respect of either the influence of Torrens principles or the role of the Colonial office. The historical record indicates rather that the Vancouver's Island statute had been based on a report of a British Commission in 1857. When the subject of registration of title came up again at the end of the decade, the legislators were aware that registration of title by memorial had been tried in Upper Canada, and failed, and instead :

"The Imperial Land Transfer Act 1862 and 'Torrens' Real Property Act 1860 of South Australia came under review"<sup>103</sup>.

Neither was adopted. The British Act was seen as Act too complex and with too many loopholes and exceptions while the Torrens system was considered more suited to "... a thickly populated country like Australia"<sup>104</sup>.

The first substantial British Columbia statute relating to title to land was the Land Registry Act 1861. Of this Act Governor Douglas stated :

"... Considering the great importance of establishing as early as possible a system of registration of deeds adapted to the peculiar character of the colony and of which the colonists might with facility avail themselves I have endeavoured to take advantage of the experience of other countries..." "

with the result that the statute was very similar to the registration laws then in force in Canada "and very similar I believe to those in force in other British Colonies". He had, however, rejected the more elaborate Vancouver's Island system because of the differences in scale and level of development between Vancouver's Island and British Columbia<sup>105</sup>.

A more commonly-cited candidate for the first "Torrens" statute in Canada is the British Columbian Land Registry Ordinance 1870(BC). Claims that by this statute British Columbia had adopted Torrens title were made, and refuted, from relatively early days. Thus in 1894 Archer Martin was moved to write in the *Western Law Times* that an American writer had wrongly claimed that the British Columbian Act of 1870 instituted Torrens title: :

" It is not in force there now, the system in vogue in that province lacking the essential element of Torren's [sic] idea, a guaranteed title...."<sup>106</sup>.

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<sup>102</sup> V diCatri (ed) *Thom's Canadian Torrens System* (2nd ed, Burroughs & Co, Calgary, 1962), pp18-19.

<sup>103</sup> HPP Crease, draft report to Governor, n.d. but 1870, Attorney-General's reports to Governor on Bills 1864-70, BCARS GR752. A further draft report preserved in the Crease papers BCARS Add Mss 54 box 13, file 6 does not mention Torrens title at all.

<sup>104</sup> Ibid. Compared with British Columbia, the settled areas of coastal Australia could well be considered "thickly populated".

<sup>105</sup> Douglas to Newcastle 21 October 1861 CO60/11, despatch no 61/61.

<sup>106</sup> (1894) 5 *Western Law Times* 35. Curiously enough the lack of precision in analysis of the land title systems persisted. The Dean of the University of Manitoba Law School apparently told his students of the Australasian origins of the Torrens system and : "In 1861 Vancouver Island adopted a system drawn to a large extent from Torrens system. In 1869 the system was adopted for the United colonies of Vancouver Island and British Columbia. With the admission of British Columbia to confederation the system was embodied in the Land Registration ordinance of 1870. The system is not quite a Torrens system, the registration was not made

Scrutiny of the 1870 Act shows it was far from a full Torrens system – in particular the registration of title did not confer an indefeasible title (the essential foundation of Torrens's brainchild) but rather only a prima facie title which could be challenged for some years after registration. The statute also lacked any provision for a guarantee fund, an element rejected because in British Columbia titles would receive less scrutiny prior to registration than in South Australia or other Torrens title systems. It is notable that Alston, the colony's Registrar-General, was able to cite the actual charges made in South Australia to fund the guarantee fund there.<sup>107</sup> The archival record confirms the conclusion to be reached from a reading of the statute. It is clear that at the time of the 1870 ordinance, the British Columbian legislature had actually considered and rejected implementation of a Torrens system.

It was not until the 1890s that pressure for the adoption of a true Torrens system grew sufficiently intense to produce legislative action. In British Columbia, unlike some other jurisdictions, it is clear the dominant pressure group seeking change was the local Law Society<sup>108</sup>. A specially-requisitioned meeting of the Benchers of the Society, chaired by the Attorney-General D M Eberts QC, was called in 1895 at which was passed a motion that:

"...in the opinion of the meeting the introduction of the Torrens system of land registration would prove beneficial and it is strongly recommended that a bill of that character be introduced at the next session"<sup>109</sup>

It is noteworthy that the mover of the motion, L G McPhillips, of Vancouver had previously been in practice in Winnipeg and therefore had experience of the Manitoba version of Torrens title legislation<sup>110</sup>. It appears that nothing came of this in 1895 or 1896<sup>111</sup>, and the Law Society returned to the issue in 1897, but on this occasion it determined to approach private members of the House of Assembly directly to bring in a suitable bill, rather than going through the cabinet or Attorney-General<sup>112</sup>, although this initiative too seemed to meet with little success in that year<sup>113</sup>. More success attended the reformer's efforts in 1898.

Torrens title was, however, not the only Australian innovations proposed in these later years as a model for British Columbian land law – there was a proposal in 1895

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compulsory" and "title was prima facie only for 7 years": Lecture notes of J Thorson, "Dean", University of Manitoba Law School 1921-22, in Legal Judicial History Institute Collection, Public Archives of Manitoba, P1356 File A40.

<sup>107</sup> Alston, enclosed with Musgrave to Kimberley 7 December 1870 CO60/41.

<sup>108</sup> The first attempt by the Law Society of British Columbia to procure a significant change in the provincial land law came in the early 1870s, when the Society appointed a committee, consisting of George Alston and George Pearkes, to 'confer' with the Attorney-General as to the possibility of documents of title being issued to equitable owners of land, a proposal which the Attorney-General declined to support: Minute Book, Law Society of British Columbia 1869-1874, p 11 (LS BC Archives vol 1623). The entry is undated but appears to refer to 1870 or 1871. I would like to record my thanks to the Society, and particularly to Jason Eamer-Gault and Bernice Chong, for assistance received.

<sup>109</sup> Minutes of meetings of Benchers LS BC 12 December 1895, LS BC archives Vol 1634.

<sup>110</sup> McPhilip's election as a bencher was noted in (1891) 2 *Western Law Times* 20, where his earlier career is sketched.

<sup>111</sup> Minutes of Meeting of Benchers of LS BC 2 March 1896, LS BC Archives vol 1634.

<sup>112</sup> Minutes of Meeting of Benchers of LS BC 2 February 1897, LS BC Archives vol 1635.

<sup>113</sup> Minutes of Meeting of Benchers of LS BC 5 April 1897, LS BC Archives vol 1635.

that the province should convert its current system of land tenure to the South Australian system of leases with a perpetual right of renewal<sup>114</sup>.

In the first province to adopt a true Torrens system, Manitoba, events were somewhat different. The most direct influence appears to have been the activity of the Manitoba Land Law Amendment Association. That association, clearly an offshoot or affiliate of the Canada Land Law Amendment Association<sup>115</sup> had written to the Manitoba Law Society in 1884, enclosing some pamphlets on the Torrens Land Transfer system, "which it is proposed to have introduced into this province" and informing them that "Mr J S Ewart has in hand the proposed Bill, and will be able to give your Society full particulars"<sup>116</sup>. While the Law Society appears not to have been stimulated to any activity by this intimation<sup>117</sup>, the Association clearly had far more success with gathering support in other fields. By the time A C Killam, later a judge of the Manitoba Supreme Court, introduced a Real Property Bill in 1884, the Association had recruited substantial support in the legislature, as well as the backing of 13 municipalities and the Winnipeg Board of Trade<sup>118</sup>. The bill did not meet with success that year, largely because there was concern the bill was introduced too late in the session<sup>119</sup>. In 1885 the Real Property Bill was reintroduced, this time as a government measure. The Attorney-General, E C Hamilton, acknowledged the South Australian origins of the Torrens system. Less accurate knowledge was betrayed by a Mr Millar who is reported as stating that the bill was based on an "...Act introduced into Queensland, South Australia in 1861" which had required but one amendment in 1877. While the speeches reported were generally supportive of the measure, it is notable that there was no mention at all of the system in force in British Columbia, and it appears ease of sale and purchase of land was seen as a less important feature of the system than its capacity to allow land titles to provide simpler and better security for mortgages, and thus to lower credit costs<sup>120</sup>. It is possible, but unlikely, that there was a degree of direct contact between the Manitoba reformers and the Australian colonies. It was stated in the *Western Law Times* in 1891 that the Torrens system

"was introduced into this province by [ the Real Property Act 1885] after lengthy correspondence with the authorities of several of the Australian colonies...."<sup>121</sup>.

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<sup>114</sup> T Ennor Julian, Vancouver, to J H Turner (Premier) 22 March 1895 BCARS GR 441, Premier's Correspondence, Box 2, file 1.

<sup>115</sup> Discussed below p30.

<sup>116</sup> Frederick B Ross, Secretary Manitoba Land Law Amendment Association to J A M Aikins, Secretary Manitoba Law Society 8 February 1884, Manitoba Law Society Papers, Legal Judicial History Institute collection, Public Archives of Manitoba P1441 Miscellaneous correspondence file 2080.

<sup>117</sup> The Minutes of the Benchers of the Law Society, 9 February 1884, record only "letter from Ross read and ordered to be filed": Benchers Minutes, Manitoba Law Society Papers, Legal Judicial History Institute collection, Public Archives of Manitoba P1375.

<sup>118</sup> *Manitoba Daily Free Press* 8 April 1884.

<sup>119</sup> *Manitoba Daily Free Press* April 19 1884 Only one parliamentarian is reported as speaking against the principle of the Bill.

<sup>120</sup> *Manitoba Daily Free Press* 17 April 1885.

<sup>121</sup> (1891) 2 *Western Law Times* 169.

If indeed this was the case, the archival record has preserved neither any correspondence between governmental agencies and any Australian colony, nor indeed any documents from which such contacts can be inferred.

A valuable indication of what the proponents of reform saw as the state of knowledge among Manitoba lawyers is given by one of the leading advocates of Torrens legislation, Beverley Jones, who began an article in the *Canada Law Times* in 1883 with a statement suggesting there was little if any direct local knowledge of Torrens title systems:

“From the publications of the Cobden Club in England and of the Canadian Land Law Amendment Association here, all persons interested in the subject of land transfer have become more or less familiar with the advantages of the Torrens system”<sup>122</sup>.

Jones then went on to argue that Australian experience showed Torrens title land was enhanced in value by the increased security such title gave. More speciously, he also argued that beneficiaries of trusts were better placed because their equitable interest would be sufficient to entitle the beneficiary to place a caveat on the title<sup>123</sup>. E Duncan Armour, editor of the *Canada Law Times*, appeared throughout 1883 and 1884 to consider that no adequate case for reform had been made. This view was not based on any detailed knowledge of the Torrens system – he avowed he had none – but rather because he considered Ontario could provide an adequate model for registration of titles, and also that under a Torrens system many current titles would prove unregistrable<sup>124</sup>. Yet he clearly read widely after the discussion began, so that in a later editorial he could challenge the suggestion that trust beneficiaries would be better placed by quoting from a report on Torrens title prepared for government of the Straits Settlement where it was recommended that trusts should not be on the register<sup>125</sup>. In the general discussion, only one correspondent referred specifically to Australian experience with Torrens, when George S Holmsted drew particular attention to the successful implementation of Torrens Title in Tasmania where some titles went back 60 years<sup>126</sup>. Contributed articles favouring the Torrens system are also to be found in the *Manitoba Law Journal*<sup>127</sup> in 1884 and 1885. That journal was then edited by J S Ewart, who not only became a strong advocate of Torrens title but actually prepared the 1885 bill<sup>128</sup>.

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<sup>122</sup> Beverley Jones “Some minor advantages of the Torrens System of Land Transfer” (1883) 3 *Canada Law Times* 475.

<sup>123</sup> Ibid 476. The comment as to trusts is attributed to “one of the most eminent examiners of titles in Australia”. From a later comment at (1884) 4 *Canada Law Times* 16, it is almost certain that the examiner cited was Gawler of South Australia.

<sup>124</sup> (1883) 3 *Canada Law Times* 478.

<sup>125</sup> See (1884) 4 *Canada Law Times* 16.

<sup>126</sup> (1883) 3 *Canada Law Times* 538.

<sup>127</sup> (1884) 1 *Man LJ* 39 and (1885) 2 *Man LJ* 107. It seems most unlikely, however, that the former article alone significantly influenced the passage of the Real Property Act 1885, as has been suggested by check initials D Gibson & L Gibson “*Substantial Justice : Law and Lawyers in Manitoba 1670-1970* (Peggie Publishers Winnipeg 1972) 158-9. A similar or lower degree of probability attaches to the suggestion there made that the legislation was based on “Torrens New South Wales legislation”, given that the article cited discussed, accurately, the South Australian origins of the system.

<sup>128</sup> According to a biographical note in the J S Ewart papers, Public Archives of Manitoba, John Skirving Ewart was born Toronto in 1849. He studied at Osgoode Hall Law School and was called to the Ontario bar in 1873. He came to Winnipeg in 1882 and prospered sufficiently to take silk in 1884. His later distinguished career is recorded in his papers, which unfortunately do not contain anything for the 1884-1885 period.

Officials in Manitoba were in no doubt about the effect of the adoption of the Torrens system in Manitoba, claiming presciently:

“The success of the ‘Torrens system’ in this province has excited attention throughout the Dominion and there now appears to be little doubt that it will be generally adopted in the more important counties of Ontario and introduced by the Dominion Government into the North-western territories of Canada”<sup>129</sup>

Yet the actual practical effect of the new law, at least initially, not great in absolute terms. The Registrar-General’s figures show only one application under the Act for registration of a title in July 1885, none in August, three in September, 17 in November and 46 in December (no figures were given for October). By the end of the year 22 certificates of title had been issued, 12 of those in December. The low number of applications in the first months were attributed to differences of opinion among local lawyers as to the meaning and effect of some provisions, with the increase coming after the contentions were settled by an early case on the Act<sup>130</sup>. An indication of the perceived importance of the new system can be found in a letter written in 1890 by Louis W Coutlee, a Winnipeg practitioner and author of a recent treatise on the real Property Act in which he indicated a willingness to lecture to the law students of Manitoba :

“... on the ‘Real Property Acts (Torrens System)’ and I might suggest that the subject could with advantage be dealt with in two or more lectures”<sup>131</sup>.

In Ontario, the critical factor leading to the enactment of a Torrens title statute, according to H C Jones, the author of an 1886 treatise on the Ontario Land Titles Act 1885 and the Manitoba Real Property Act 1885, was the advocacy of Edward Blake in 1879 and, more directly and substantially, the support of Oliver Mowat.<sup>132</sup>

By contrast, Jones ascribes the adoption of Torrens title for the North-West Territories by the federal parliament, to the zeal and activity of the Canadian Land Law Amendment Association. Indeed, the bill introduced into the House of Commons in 1883 was drafted by two Toronto lawyers, Beverley Jones and Herbert C Jones, (the former being the Association’s Secretary, the latter the treatise writer). The Association, under a local alias, “...also took steps to have the Torrens system introduced into the province of Manitoba”<sup>133</sup>. An anonymous reviewer of Jones’s book shed light on the motives of the Land Law Amendment Association :

“The Torrens system was taken up in this country, originally, by persons interested in large companies loaning money on land, doubtless with the thought of facilitating the mortgage and sale of properties”.<sup>134</sup>

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<sup>129</sup> Public Archives of Manitoba GR174 OS 16-1, Third annual report of the Attorney-General’s Department.

<sup>130</sup> Ibid. The case was *Re Irish* (1885) 2 Man LR 361.

<sup>131</sup> Coutlee to Secretary Manitoba Law Society 26 December 1890, Manitoba Law Society Papers, in Legal Judicial History Institute Collection Public Archives of Manitoba P1379 File A719. A pencil note in the same file indicates J S Ewart, the draftsman of the legislation, was also interested in lecturing on real property.

<sup>132</sup> See H C Jones *The Torrens System of Transfer of Land* (Toronto, Carswell 1886). It is to be noted that Marcia Neave, who has written extensively on the Ontario Act and considers the legislation was substantially based on the English Land Transfer Act 1875 (see “Indefeasibility of Title in the Canadian Context ” (1976) 26 *U Toronto LJ* 173 and “The Concept of Notice and the Ontario Land Titles Act ” (1976) 54 *Can Bar Rev* 132) seems to have been unaware of this aspect of the statute’s history.

<sup>133</sup> Ibid, p3.

<sup>134</sup> (1886) 22 *Canada LJ* 211 The reviewer also noted that the work naturally contained little discussion of Ontario or Manitoba case law, because there was little to discuss, but complimented it for the citation of relevant Australian cases.

Jones's claim for the primacy of the role played by the Canada Land Law Amendment Association may be well-founded, though it is clear the reported experience of the Australian colonies influenced many parliamentarians<sup>135</sup>. The first steps were taken in the House of Commons in 1884, with the introduction of a private member's bill by a Mr McCarthy, though it seems that McCarthy merely introduced a bill prepared by Beverley Jones and Herbert Jones, the stalwarts of the Land Law Amendment Association (who were described as also having prepared the Manitoba Real Property Bill<sup>136</sup>). The first reported debate in the parliamentary record is in 1884 when a Mr Vidal moved to call attention to a petition of the Canada Land Law Amendment Association for the introduction of the Torrens system of registration of titles in Northwest Territories, asking whether Government had or had not considered it. Vidal described the Association as having been formed:

"by reason of the great inconveniences which had been found to attend the law of real estate at present prevailing in the Province of Ontario. They go on to state in their petition that they have a very large experience in this matter on account of their connection with loan societies and the necessity of investigating titles to lands, for a period of over a quarter of a century."<sup>137</sup>

Vidal indicated that the association was promoting reform because it wished to increase the volume of its business in the Northwest Territories. He then proceeded, avowedly speaking as an informed layman and not a lawyer, to outline a more than slightly unreliable account of the history of Torrens title, claiming inter alia that it had been in force in Vancouver's Island since 1861, was in force in British Columbia and in the United Kingdom under the British act of 1875<sup>138</sup>. It is notable that Vidal's account of Torrens law in Australia was drawn not directly from any Australian source, but from the 1881 "Blue Book" of United Kingdom House of Commons. In the following year, the Government took up the cause of reform, and the Bill Respecting Real property in the Northwest Territories was introduced as a Government Bill. Sir Alex Campbell, the Minister of Justice, claimed that there was a pattern in Eastern Canada of adoption of American initiatives in land law, but in this case Torrens was a better system to adopt. It is notable that, unlike Vidal the previous year, Campbell was at pains to point out that the British Columbia system was not a full-blown Torrens system<sup>139</sup>. Both Campbell and other later speakers emphasised the peculiar suitability of the newly-opened Northwest Territories for the initiation of a Torrens system.

Two features of the debates on the Bill are worthy of mention. The first is that some contemporaries were well aware that the bill was at least in part aimed at facilitating the finance industry. As one Senator put it: "The people that this bill will suit the best are those who have money to loan and those who want to borrow"<sup>140</sup>. However when in committee stage it was suggested that the mortgagee sales provisions were "drawn at the interests of the lenders of money", Campbell was quick to reply that

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<sup>135</sup> The latter is referred to by I L Head "The Torrens System in Alberta" (1957) 35 *Can Bar Rev* 1; the former seems to have eluded both Head and other writers.

<sup>136</sup> See Sir Alex Campbell [1885] *Debates of the Senate of Canada* 78. An alternative ascription of the authorship of the bill is provided by Vidal [1884] *Debates of the Senate of Canada* 385, who says the Bill was prepared by a "Mr Penney". Campbell appears a more authoritative and informed source.

<sup>137</sup> [1884] *Debates of the Senate of Canada* 383.

<sup>138</sup> [1884] *Debates of the Senate of Canada* 384.

<sup>139</sup> [1885] *Debates of the Senate of Canada* 70.

<sup>140</sup> Mr Scott [1885] *Debates of the Senate of Canada* 176.



they were copied verbatim “from the Australian Act”<sup>141</sup>. The second feature, of which the mortgagee sales reference is an example, was the sprinkling of references to Australian practice and law made during the debate. It is notable that one such reference is, as with Vidal in 1884, a recitation of the views of the Australian Registrar-Generals as recorded in the House of Commons United Kingdom Blue Book of 1881.<sup>142</sup> Another reference is of a different nature. Sir James Gowan recited the Australasian colonies which adopted Torrens, and went on:

“I happened to know some gentlemen from these colonies, and among them was Sir John Hall, who was for five or six years premier of New Zealand”.

Gowan reported Hall as having told him that originally there was a strong feeling in New Zealand against the Torrens system, but it was adopted there when it was seen to be a success in Australia and now New Zealand prized it highly<sup>143</sup>. Although the Bill did not pass in 1885, it was passed through the parliament in short order in 1886.

In the eastern colonies, as in British Columbia there were suggestions, other than Torrens, for derivative statutes relating to land law. The most notable occurred in the province of Canada where the Act for Quieting Titles 1866(Can) was drafted by Oliver Mowat as a method of ameliorating concern as to potentially defective titles to land. Mowat reported his role thus:

“...my reading had brought to my knowledge the remedy first adopted in Ireland afterwards acted upon in Australia, New Zealand and elsewhere and lately applied in England itself. What I have done is the draftsman’s work of adapting laws already in force in other countries to the circumstances and requirements of this section of our own Province”<sup>144</sup>

The Canada model, as preserved in the province of Ontario, was then proposed as a model for a federal tribunal to deal with potentially defective titles in Manitoba<sup>145</sup>.

A rather different Australian initiative drew attention in 1881 and 1882, when the *Canada Law Journal* published articles dealing with Victorian initiatives to deal with unlicensed conveyances. In the latter year the *Journal* also printed a Manitoba law prohibiting unlicensed conveyancers, and added to it the text of a Victorian statute on the same subject, adding “A correspondent there gives us a copy of it”<sup>146</sup>.

It is clear that Torrens engendered less enthusiasm in the Maritimes. The last of the Canadian jurisdiction to consider the adoption of Torrens title legislation in the nineteenth century was Nova Scotia, where the long-serving and usually conservative Attorney-General James Wilberforce Longley<sup>147</sup> moved the introduction of a “Bill for the Registration of Land Titles” in 1897. In moving the Bill, Longley traced the history of the spread of the Torrens system from South Australia to the

<sup>141</sup> [1885] *Debates of the Senate of Canada* 272. Campbell also defended a provision which restricted estates in land to fee simple as having been from “the Australian Act”, but as the provision seemed inessential, Campbell was willing to see it removed. [1885] *Debates of the Senate of Canada* 257.

<sup>142</sup> [1885] *Debates of the Senate of Canada* 203

<sup>143</sup> [1885] *Debates of the Senate of Canada* 197.

<sup>144</sup> See editorial “Quieting Titles” (1865) 1 *Upper Canada LJ* (ns) 114, quoting a letter written by Mowat in February 1864.

<sup>145</sup> Morris to Secretary of State for the Provinces 31 December 1872, Morris papers, Public Archives of Manitoba, MC 12 A1.

<sup>146</sup> (1881) 17 *Canada LJ* 420; (1882) 18 *Canada LJ* 86.

<sup>147</sup> See Biographical fragment by Justice R H Graham, Public Archives of Nova Scotia MG1090, vol 177 despatch no 22.

other Australian colonies, New Zealand, British Columbia(sic), Manitoba and Ontario. He put forward two reasons for the adoption of a Torrens system; the first being that the system by providing a better title reduced the costs of searching titles – a matter which would be of great importance to, he said, to mortgagees<sup>148</sup>. The subsidiary reason advanced was that the Torrens system might allow individuals to do their own conveyancing. An interesting insight into the often convoluted and indirect flow of information about Australian law to the Canadian provinces is offered by the fact that on this point, Longley cited the evidence given by the South Australian Agent-General before a British Parliamentary Select Committee, rather than any Australian speech or publication<sup>149</sup>. The bill did not proceed beyond the second reading, as Longley withdrew it after requests for time to consider, perhaps because its introduction was only designed to prepare the way for a fuller debate in a subsequent session<sup>150</sup>. If this was the plan, it appears to have been abandoned as there is no sign Longley ever introduced a further bill on the point. A modified Torrens system was introduced, unsuccessfully, in 1904<sup>151</sup>.

By contrast, neither Torrens title systems, nor any other major reform, evoked any interest among the legislators of Prince Edward Island. On the relatively few occasions in which serious discussion of land law as such (ie as opposed to the perennial debates over absentee ownership) took place, it appears resort was had either to English law or to piecemeal local reforms based on the colony's own experience<sup>152</sup>. Nor does the local bar appear to have been avid for reform, though in 1899 it did resolve to support a Land Registry Amendment Bill proposed by the Registrar<sup>153</sup>.

New Brunswick, too, seems to have been reluctant in the nineteenth century to attempt any major reforms of its land law. It is notable that one of the more interesting proposals for reform was the Homestead Bill 1861, designed to allow a solvent person to protect a homestead from later claims by creditors, which was taken from American precedents<sup>154</sup>. Curiously enough, New Brunswick did move to adopt Torrens title many years after other provinces had done so. The Land Titles Act 1914(NB) was designed to adopt a system under which Masters of Titles in the various counties would scrutinise applications for registration of titles to land and, if satisfied, would issue certificates which were thenceforth proof of title to the land in question. Apparently the system was never brought into force after the Government

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<sup>148</sup> (1897) *Debates of the Nova Scotia House of Assembly* 110 (16 February 1897) reports the reference to making it easier to search titles, but does not bring out, as does an account of the debate in a local daily paper (*Morning Chronicle* Halifax 18 February 1897) that this was seen to be primarily of advantage to mortgagees.

<sup>149</sup> (1897) *Debates of the Nova Scotia House of Assembly* 110 (16 February 1897).

<sup>150</sup> (1897) *Debates of the Nova Scotia House of Assembly* 138 (20 February 1897).

<sup>151</sup> R Stein "Some Aspects of Title by Registration in the Maritime Provinces of Canada" (1976) 2 *Dalhousie LJ* 633, 635.

<sup>152</sup> See for example the debates on registration of mortgages (1871) *Debates of the Legislative Council of Prince Edward Island* 169 (14 March 1871) and on the Deeds Registration Amendment Act 1875 (1875) *Debates of the Legislative Council of Prince Edward Island* 34 (March 30 1875).

<sup>153</sup> Law Society of Prince Edward Island Minute Book 1877-1906, Public Archives and Record Office of Prince Edward Island Acc 4112

<sup>154</sup> (1861) *Debates of the New Brunswick Legislative Assembly* 21 (26 February 1861).

had a change of heart and derailed the system by not appointing the required Masters<sup>155</sup>.

#### 4. The context for the use of Australasian models and their influence on Canadian law.

To understand the role that Australasian precedents could play in the formulation of nineteenth century Canadian statute law, it is necessary first to explore some of the attitudes of Canadian legislators. It is clear that, for the most part, the proponents and framers of legislation were quite content to draw on precedents from other jurisdictions<sup>156</sup>. In some cases this may have been a simple matter of avoiding the necessity of committing resources to the drafting of original legislation, or a desire to avoid any uncertainty as to the effect of such an original act. In other cases, particularly but not solely where the statute was derived from English legislation, the colony may have been seeking to take advantage of others' efforts to reform unsatisfactory areas of the law. It is notable that on some occasions the statutory adoption of British reforms lagged hugely behind the pace of reform in the United Kingdom. An example, albeit involving more delay than appears to have been the average, is the adoption by Prince Edward Island in 1865 of three English statutes passed many years previously<sup>157</sup>.

Practical advantages of another kind might also be found. On occasion the colonial authorities advanced the derivative nature of particular statutes as a way of deflecting criticism of the legislation, or of diminishing the likelihood of objection by the Colonial Office. as can be seen in Nova Scotia in 1891, where the Provincial Secretary attempted to defend the substantial official salaries being paid locally by citing higher salaries paid elsewhere, as for example "In Australia the salary of the departmental heads ranged from \$7500 to \$10,000"<sup>158</sup>.

It is also clear that the extent to which any colony looked to other colonies for useful precedents was much affected by the attitudes of leading politicians or officials. Some officials were very much opposed to such borrowings. In British Columbia there is certainly less evidence of inter-colonial borrowing in the 1860s, as compared with earlier and later years, a phenomenon which seems likely to have been at least in part attributable to the views of the then Attorney-General, Henry Pering Pellew

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<sup>155</sup> There is a brief report of the committee stage of the Bill in (1914) *Synoptic Report of New Brunswick Legislative Assembly* 135. See also R Stein "Some Aspects of Title by Registration in the Maritime Provinces of Canada" (1976) 2 *Dalhousie LJ* 633, 635. I am indebted for information as to this statute, and the later developments, to Professor David G Bell of the Law School of the University of New Brunswick.

<sup>156</sup> It is curious that the extent, and general substantial degree of success, of such inter-jurisdictional "borrowing" of legislation has generally escaped the notice of historians, and is considered only in passing by theorists of comparative law who have debated the possibility of viable "legal transplants". Compare for instance Alan Watson (who in *Legal Transplants* (University of Edinburgh, 2<sup>nd</sup> ed 1993) refers albeit briefly to aspects of the New Zealand position (but otherwise ignores the British colonial experience) in advancing his thesis that legal transplants are sometimes efficacious) with Pierre Legrand, who maintains the opposite view ( see Legrand "the Impossibility of Legal Transplants" (1997) 4 *Maastricht J European and Comparative Law* 111; and "John Henry Merriman and Comparative Legal Studies: A Dialogue" (1999) 49 *Am J Comp Law* 3. I would like to thank DeLloyd Guth of the University of Manitoba for alerting me to Legrand's work.

<sup>157</sup> The statutes were "An Act for the amendment of the law and the better administration of justice" (PEI) (1865 c6), adopting a 3&4 Will 4 c42 (Imp); Real Property Act 1865 (PEI) (1865 c14) adopting 8&9 Vict c106 (Imp) and the Libel Amendment Act 1865 (PEI) (1865 c25), a "transcript" of 6&7 Vict c96(Imp), "with an additional clause". See report of Edward Palmer, Attorney-General, enclosed with Hodgson to Cardwell 26 September 1865 CO226/101 despatch no 36/65.

<sup>158</sup> 1891 *Debates of the Nova Scotia House of Assembly* 137-39 (15 May 1891) pp137ff He also cited figures from Manitoba, British Columbia, Jamaica and Natal.

Crease<sup>159</sup>. Crease in 1869 indicated his reluctance to copy the legislation of other jurisdiction:

“...the experience of recent legislation is against suddenly taking a local statute of another Colony, framed under a set of circumstances special to that Colony, and inserting it into the Statute Book of another Colony where different circumstances and different laws exist, with which it cannot possibly harmonize”<sup>160</sup>.

In at least one case Crease did draft a very derivative Act, the Bankruptcy Act 1864 which largely adopted the Bankruptcy Act 1849(Imp), but this appears to have been done on instructions from Frederick Seymour, the colonial Governor<sup>161</sup>. By contrast, the scanty papers of Crease's successor, George Philippon<sup>162</sup> reveal regular reference to legislation from other colonies, particularly the province of Canada<sup>163</sup>. Later Attorneys-General, after British Columbia acceded to the Confederation, also regularly had recourse to Ontario law as a precedent for new bills<sup>164</sup>.

It was also not uncommon for colonial legislators and politicians to play a 'nationalist' card on occasion and suggest that there was no need to copy the laws of another jurisdiction. Perhaps the epitome of such comments was the statement of the then Provincial Secretary of Nova Scotia in 1869:

"I hold, Sir, that the day has not yet come when a gentleman representing a constituency in Nova Scotia should get up and point across the border so often, to the people and institutions of another country"<sup>165</sup>.

It was, however, much more common to find a general acceptance that other jurisdictions could, on occasion, provide useful precedents for local legislation, there was, perhaps unsurprisingly, far less agreement as to which jurisdictions should be looked to for such precedents.

When a Canadian legislature sought precedents from outside its boundaries the most common source exploited was English legislation<sup>166</sup>. Many Canadians were reluctant

<sup>159</sup> For Crease's life see DCB vol 13, p 229. His biographer, Tina Loo, refers at p 230 to Crease's "self-conscious Englishness".

<sup>160</sup> Crease to Governor 6 May 1869 BCARS GR752/8.

<sup>161</sup> See the documents in BCARS GR673/1 Box 2.

<sup>162</sup> A brief evaluation of Philippon's performance as Attorney-General is to be found in Musgrave to Kimberley 18 January 1871 CO60/22 "Confidential".

<sup>163</sup> FN For example Philippon's draft of the Literary Societies Act 1871(BC) in which almost all the sections have annotations referring to corresponding sections of the Canadian Act of 1859, (22 Vict c72), except for two sections which refer to an Imperial Act except a couple of sections where the reference is to the Imperial Act 17 & 18 Vict c112 BCARS GR674/2. Other legislation derived from Canadian provincial originals include the Revision of Statutes Act 1871(BC) (see BCARS GR673/10 Box 6) and the Charitable, Philanthropic and Provident Societies Act 1871(BC) (see Musgrave to Kimberley 31 March 1871, CO 64/43 despatch no 35/71). The records also contain a Bill, apparently not proceeded with, "respecting joint contractors and joint judgment debtors" taken from an Upper Canada statute of 1843 (see BCARS GR1533 - Box 1 file 1).

<sup>164</sup> In 1873, at least four statutes were copied or derived from Ontario models: An Act to allow the legislature to hear evidence on oath (copying Ontario 35 Vic c5); the Insane Asylums Act 1873 which modified Ontario 34 Vic c18; the Life Insurance Act 1873 (taken from 29 Vict c17 Canada as modified by Ontario 33 Vic c21) and the Married Women's Property Act 1873, a transcript of Ontario 35 Vic c16 itself modelled on English legislation. See Walkem to Trutch (3 separate letters) 10 February 1873, BCARS C/AB/30.4J/4.

<sup>165</sup> 1869 *Debates and Proceedings of the Nova Scotia House of Assembly* p29 (12 May 1869), debate on the Ballot Bill.

<sup>166</sup> Examples taken at random from the extant records include the Lunatics Estates Act(NB) 1834 (see CJ Peters to Campbell (n.d.) enclosed with Campbell to Stanley 5 May 1834 despatch no 28/34 CO188/49) and the Slander

to criticise the adoption of English law, but still showed some reluctance, at least in public utterances, to copy laws for other Canadian jurisdictions. As one politician put it:

"I think enough has been said about the law on this subject in Ontario, in New Brunswick, in Great Britain. I think we should always, as one Hon member has said, when it is possible, follow the example of the mother country England, though we must accept that circumstances there are different.. But what we have to do with is the Province of Nova Scotia. Why should we be called upon to assimilate our laws to those of Ontario or New Brunswick?"<sup>167</sup>.

The degree of reliance on English law varied from province to province. The ethos of the United Province of the two Canadas was, in the eyes of at least one contemporary observer, predominantly focussed on England, and with a mind-set which deterred reform of the law until an English precedent was available:

"It is the policy of our legislature to await the working of a reform in England before hazarding an experiment here"<sup>168</sup>

However reliance on English models was not always met with approval, particularly where there was a local alternative precedent<sup>169</sup>.

In general Canadian provinces copied their laws on a substantial scale from other jurisdictions – particularly from the colony of Canada or, later, Ontario<sup>170</sup>. The use of Ontario precedents was not always welcomed by commentators – the editor of the *Western Law Times*, commenting on an 1893 proposal for a Judicature Act for Manitoba thus:

"...it was a matter of regret that the Ontario Act was followed as a model instead of that of England. As a model of bad drafting commend unto us the Ontario Judicature Act"<sup>171</sup>

Some statutes combined sections from a variety of sources. In Nova Scotia, for example various statutes assimilated precedents from different systems, as with the

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and Libel Act 1850 (NS) (said to be "a transcript as nearly as circumstances allow" of an English act; memorandum by La Fontaine and Baldwin n.d. enclosed with Elgin to Earl Grey 23 December 1850, CO42/566, despatch no 239/50.

<sup>167</sup> Mr Bell, 1883 *Debates and Proceedings of the Nova Scotia House of Assembly* p75 (22 February 1883), debate on the Sheriffs Bill.

<sup>168</sup> (1858) 4 Upper Canada Law Journal 77 cited in Paul Romney *Mr Attorney: The Attorney-General for Ontario in Court, Cabinet and Legislature* pp222-23.

<sup>169</sup> See for example Mr Cameron MP [1885] CHCD 2397 criticising use of the English model for the Proof of Entries in Books of Account Bill instead of the simpler Ontario Act.

<sup>170</sup> In new Brunswick, for example, Canadian law was drawn on for the Affidavits, Declarations and Affirmations Act 1864(NB), described as "nearly a transcript" of the Canadian Act of 1863 (see Johnson, n.d. enclosed with Cole to Cardwell 4 July 1864, CO 188/141 despatch no 59/64) while the Marriage Act 1848(NB), which extended the power to solemnize marriages to nonconformist ministers was intended to "...make the law just as it stands in Prince Edward Island" (see WB Kinnear, Acting Attorney-General 21 March 1848 enclosed with Colebrook to Grey 8 April 1848 CO188/104 despatch no 35/48). The Parliamentary Privilege Act 1876(NS), which was "modelled on the legislation of Ontario and Quebec" ((1876) *Debates of the Nova Scotia House of Assembly* 28 (17 February 1876). Prince Edward Island law and law reform, in particular, lagged behind other provinces. The legal profession of the province do not appear to have been fervent proponents of locally-drafted reform, as is perhaps best demonstrated by the decision of the Law Society in 1899 that it would support a bill prepared by Arthur Peters to amend the insolvency legislation but if the bill did not pass, Peters should then "introduce an Act similar to that in force in Ontario": Minutes of AGM 14 April 1899) Minute Book, Law Society of PEI 1877-1906 Prince Edward Island Public Archive and Record Office Acc 4112.

<sup>171</sup> (1893) 4 *Western Law Times* 13. The editor indicated a preference for the English legislation as a model.

Normal School Act 1854(NS) which drew on Canadian and English experience, or the Aliens Act of the same year of which the Attorney-General commented :

"The tendency of legislation in Canada West is in the same direction and the final clause of the Act is a transcript of the law of Massachusetts"<sup>172</sup>.

The same phenomenon is found elsewhere, as with the Railways Act 1858(NB), which was said to have been "copied in many respects from Acts in operation in England and in other countries"<sup>173</sup>.

Where a Canadian legislator was tempted to look beyond the Canadian precedents available, and to discover nothing of assistance in the English law ( or perhaps rarely to discard anything England might have to offer) it was frequently more likely that a suitable precedent would be found in some American jurisdiction<sup>174</sup>. It would appear Ontario was quicker than other provinces to accept that the commonality of the North American experience meant it was wiser to look to American models than to rely primarily on British models. As the Ontario Municipal Commission 1888 put it:

"... we may find much in the reformed county, city and borough governments of Great Britain and Ireland and much even in the systems of continental Europe worthy of serious consideration and, perhaps, of adoption, we must look rather to the municipal systems of the United States for useful practical lessons, and expressly of those states whose circumstances and conditions most nearly resemble our own."<sup>175</sup>

Given such attitudes and the frequently tenuous links by which information as to Australasian innovations could be conveyed, it is not surprising that recourse to Australasian precedents was, in absolute terms, not a common phenomenon. Yet it is clear from the frequency with which it did occur, the very diverse nature of the laws copied and the number of Canadian jurisdictions where derivative legislation is encountered, that Australasian statutes did contribute significantly to Canadian statute law.

Yet if there was a degree of interest in Australasian models, it is clear that knowledge of Australasian precedents was less than complete. As late as 1851, the Governor of Vancouver's Island was asking the Colonial Office:

How far the testimony of Indians is to be admitted as evidence in the Law Courts of the Colony?"<sup>176</sup>

This inquiry came years after some Australasian colonies had legislated for the admission of evidence from non-Christian indigenes, a principle supported by the Colonial Office and such pressure groups such as the Aborigines Protection Society<sup>177</sup>, and the Native Evidence Act 1865(VI) passed some fourteen years later,

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<sup>172</sup> W Young, Attorney-General, n.d., enclosed with Le Marchant to Newcastle 21 June 1854, CO217/213 despatch no 39/54.

<sup>173</sup> Fisher n.d. enclosed with Manners-Sutton to Stanley June 24 1858 CO188/131 despatch no 36/58.

<sup>174</sup> For instance, to select examples only from New Brunswick, prohibition legislation was modelled on laws in Maine and Massachusetts ((1852) *New Brunswick Legislative Assembly Debates* 107 (17 February 1852)), and later the colony adopted a Maine model for the Intoxicating Liquor Act 1855 (NB), see Charles Fisher, n.d. enclosed with Manners-Sutton to Russell 27 June 1855 CO 188/24 despatch no 55/55. A further example is provided by the Married Women's Insurance Bill 1861 which was based on a New York statute ((1861) *New Brunswick Legislative Assembly Debates* 5 (18 February 1861)).

<sup>175</sup> Second Report of Municipal Commission 1888 (Ontario Legislative Assembly Sessional Papers 1888 no 13, p58). A similar sentiment appears in the First Report of the Commission at p22.

<sup>176</sup> See Douglas to Earl Grey 16 December 1851 British Columbia Archive and Records Service C/AA/10.1/1/c2(a).

<sup>177</sup> Unsworn Testimony Ordinance 1844(NZ); Aboriginal Evidence Act 1844 (SA) discussed by Jeremy Finn "The Intercolonial Element in Colonial Statute Law" (PhD thesis, University of Canterbury, 1996) pp 53-55.

is drafted in terms very different from any of its antipodean counterparts, and may well have been drawn without knowledge of them<sup>178</sup>. It appears the British Columbian Act of 1865 was drafted by Begbie, the Justice of British Columbia<sup>179</sup>. Partisan or ideological factors clearly often determined the degree to which there was a willingness to consider adoption of Australasian models. Nothing demonstrates this phenomenon more clearly than the two different reports issued by members of the Canada Royal Commission on Relations of Labor and Capital in 1889<sup>180</sup>. The members representing the employer interest advocated the adoption of Courts of Arbitration, and measures for conciliation, which had been evolved in France and Belgium and later adopted in the United Kingdom and the United States<sup>181</sup>. By contrast, the members representing labour interests criticised the European models as being designed for very different social and economic circumstances. These members went further, and recommended the adoption of the eight hour day, on the grounds that it was now "nearly universal" in Australia where it had been introduced in 1856 and :

"If it has been found to work there satisfactorily for thirty years, it might be worth while trying it in our Dominion"<sup>182</sup>

A similar phenomenon can be found in British Columbia in the 1890s, where at times appeal to Australian precedent was at least as much a matter of appealing to the mythos of a more egalitarian, more politically liberal, society as it was a serious proposals for any particular measure to be adopted. Thus Beaven, the leader of the Opposition in the British Columbia Legislative Assembly proposed a bill to require adherence to the eight hour limit for hours of work in all government contracts on the grounds that such a system "...has been most successful in the Australian colonies", although Beaven had to admit there was in fact no statutory provision to this effect in Australia, and the policy was dictated by public sentiment<sup>183</sup>. Some months later, it was the Premier of the province, Robson who appealed to Australian practice in chiding opponents for not supporting Sunday observance legislation "...such as is in force in Australia and the other provinces"<sup>184</sup>. (It would appear that any such belief that Australia provided suitable models for a Sunday observance law was not shared in Ontario, as a memorandum prepared by the provincial Attorney-General's office in 1898 listed statutes from Scotland, Pennsylvania, Massachusetts, Maine; New York, Ohio and Indiana, as well as case law from England and many American states, but did not mention Australasian law<sup>185</sup>. It is curious, however, that at this time in the

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<sup>178</sup> The Attorney-General's report on the legislation, Crease to Seymour, n.d. enclosed with Seymour to Cardwell 9 May 1865 CO60/21, despatch no 45/65 refers to the necessity of the measure without reference to any other colonial precedent. Crease's reports normally allude to any other colonial legislation in point if this might influence any Colonial Office decision on disallowance.

<sup>179</sup> D R Williams "The Administration of Criminal and Civil Justice in the Mining Camps and Frontier Communities of BC", in Louis A Knafla (ed) *Law and Justice in a New Land: Essays in Western Canadian Legal History* (Carswell, Toronto 1986), p225.

<sup>180</sup> Royal Commission on Relations of Labor and Capital, Ottawa, Queen's Printer 1889, 23 February 1889 and April 1889, respectively.

<sup>181</sup> First Report 23 February 1889, p11 and Appendix 1.

<sup>182</sup> Second report, April 1889 p94.

<sup>183</sup> (1891) *Legislative Assembly of British Columbia Sessional Clippings Book* Friday January 23 1891.

<sup>184</sup> (1891) *Legislative Assembly of British Columbia Sessional Clippings Book* 3 April 16 1891.

<sup>185</sup> Anonymous memorandum, n.d. but 1898, Attorney-General's correspondence, Archives of Ontario, RG4-32, File 1898 no 65.

Maritime provinces despite a substantial increase in the volume of legislation and a movement by “progressives” seeking state regulation of business or social conditions<sup>186</sup>, the models looked to were British or American, rather than the perhaps more advanced schemes of New Zealand and South Australia.

It must also be remembered that in many ways the Canadian and the Australian colonies were competitors for markets, immigrants and influence on the British Government. Colonial politicians were keenly aware of this<sup>187</sup>. This may explain occasions where disparagement of Australia was used as a tactic in internal political debate. During a debate on confederation in the Nova Scotia House of Assembly, Dr Tupper, the Provincial Secretary quoted Joseph Howe as having said in 1863 that the law providing for universal suffrage should be repealed:

"to relieve ourselves from the charge of being the only British colony, save Australia, governed by Universal suffrage"<sup>188</sup>.

## 5. Conclusion

As this paper shows, the degree to which Australasian law and practice influenced Canadian statute law in the nineteenth century has been not only significantly understated but also, in some cases, incorrectly documented. Although the most profound influence is to be found in British Columbia – a function perhaps of the greater extent to which influential people in that colony had ties to, or experience of, Australasia, as well as the obvious utility of Victorian and New Zealand law relating to gold mining – use of, or reference to, Australasian precedents was widespread and examples can be found in every jurisdiction considered. This in itself is perhaps surprising. Even more notably, Australasian, and particularly Australian, models are the subject of frequent debate in Ontario, New Brunswick and Nova Scotia, where such personal ties were much less frequent. As the debates of Torrens title reveal, private organisations could step in and derive backing for their proposals from the Australian law, and could use the legal press as a method of publicising their aims. Other areas of law – in particular the Ontario mining legislation – reveal the importance of official government channels of communicating information. It is important to understand the phenomenon of such intercolonial borrowing from Australasia as being only a sub-set of the great degree of legislative borrowing found in Canadian law whereby British and American precedents were regularly drawn on, as were statutes from other Canadian jurisdictions. What sets the Australasian contribution apart is the extent to which it involved social and political issues where the Australasian colonies were in advance of most Canadian jurisdictions – and hence the Australasian laws could be appealed to as “progress” – or cases where English law could provide no useful precedent, as with gold mining. Borrowing from Australasian sources was thus quantitatively slight, but qualitatively important.

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<sup>186</sup> Philip Girard “The Maritime Provinces 1850-1939; Lawyers and Legal Institutions” (1996) 23 Manitoba LJ 379, especially at 394 and 399.

<sup>187</sup> See for example Tupper’s characterisation of *The Times* as being “antagonistic to the interests of British North America” and a paper that “has always favoured the Australasian colonies” (1867) *Debates and Proceedings of the Nova Scotia House of Assembly* 16 (18 March 1867). The relative success of one colony vis-a-vis another could have significant economic impact, as where Nova Scotia found itself having to pay higher rates for a loan floated on the London market because Victoria had been seeking funds in the market slightly earlier, and was better known to London investors. See 1893 *Debates of the Nova Scotia House of Assembly* 140 (23 March 1893). A similar event was noted in 1884 ( 1884 *DNSHA* 151, but there the predecessors were stated to be “Australia and New Zealand”, a reference which indicates the widespread nature of the conflation of the Australian colonies in Canadian discourse.

<sup>188</sup> (1867) *Debates and Proceedings of the Nova Scotia House of Assembly* p 13 (18 March 1867).